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In the Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE W. PICKETT, ET AL., PETITIONERS

v.

EDWARD JOSEPH X. CHAPMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether petitioners' immunity from monetary liability under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), may be defeated by a showing that the general legal standard governing their conduct had been announced at the time of the relevant events, or whether their immunity may be overcome only if petitioners reasonably could have known that their actions violated that general legal principle.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Fred Frey, Earl Buzzard, Jack Culley, J. E. Brown, and Eugene M. Cage were defendants in the district court and are petitioners in this Court.

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The Solicitor General, on behalf of George W. Pickett, Fred Frey, Earl Buzzard, Jack Culley, J. E. Brown, and Eugene M. Cage, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 801 F.2d 912. Two prior opinions of the court of appeals (App., *infra*, 45a-59a, 60a-72a) are reported at 586 F.2d 22 and 507 F.2d 1246 respectively. Two prior judgment orders issued by the court of appeals (App., *infra*, 34a-39a, 40a-44a) are unreported. The opinion of the district court (App., *infra*, 73a-84a) is unreported. One

prior opinion of the district court (App., *infra*, 89a-105a) is reported at 491 F. Supp. 967. Two other prior opinions of the district court (App., *infra*, 85a-88a, 106a-124a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 125a-126a) was entered on September 15, 1986. A petition for rehearing was denied on February 5, 1987 (App., *infra*, 127a-128a). On April 27, 1987, Justice Stevens entered an order extending the time within which to file a petition for a writ of certiorari to and including June 5, 1987; on May 28, 1987, Justice Stevens entered an order further extending the time within which to file a certiorari petition to and including July 3, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. In October 1972, respondent was incarcerated in the federal penitentiary in Marion, Illinois, in connection with his conviction for armed robbery. On October 9, respondent was assigned to the prison kitchen detail and was instructed by his supervisor—petitioner J. E. Brown—to clean the food trays. The food trays contained pork. Respondent, whose religious faith forbids the handling of pork, refused to perform his work assignment. Brown informed respondent that he would be subject to disciplinary action if he did not perform the work assignment. Respondent refused and told Brown that his God "had once before punished a correctional officer who had ordered him to handle pork in contravention of his religious beliefs, by blowing him out of an oven at

the Leavenworth Federal Penitentiary." App., *infra*, 109a; see also *id.* at 2a, 46a-47a.[1]

Brown subsequently filed an incident report charging respondent with "violating prison code 303, 'Failing to perform work as instructed by a supervisor' " (App., *infra*, 2a-3a, 47a, 109a). On October 11, the prison Adjustment Committee, which included petitioners Jack Culley, Earl Buzzard, and E. M. Cage, met to consider Brown's report. Respondent admitted the facts alleged in the report and explained that his religion barred him from handling or serving pork. The committee decided to place respondent in segregation. Respondent's status was considered at several subsequent meetings, and he was returned to the general prison population on July 25, 1973, after spending 289 days in segregation. App., *infra*, 3a, 47a-48a, 110a-111a.[2]

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[1] It was subsequently determined that respondent was not involved in the Leavenworth incident. App., *infra*, 2a n.1, 109a.

[2] Respondent at one point wrote to petitioner George W. Pickett, the prison warden, requesting his release from segregation and a statement of the reasons for his confinement; respondent did not receive a reply. On March 15, 1973, Pickett received a copy of a letter written by the Director of the Federal Bureau of Prisons indicating that prisoners should not be assigned to handle pork if that task conflicted with their religious beliefs. App., *infra*, 3a, 47a-48a, 111a.

The court of appeals observed (App., *infra*, 3a-4a) that

> [w]hile in segregation, Chapman had no social contact with other inmates. Many of his religious materials were confiscated and he had no opportunity to attend religious services. While prisoners in the general population were allowed out of their cells up to 12 hours a day, Chapman was only allowed out for exercise a few times each week and then only for 15 to 30 minute intervals. He was

2. In April 1973, respondent commenced this action against petitioners—six federal officials holding various positions at the Marion facility. Respondent sought an order directing his release from segregation, other declaratory and injunctive relief, and money damages from petitioners in their personal capacities for alleged violations of his constitutional rights. In particular, respondent asserted that petitioners had violated his rights under the Religion Clauses of the First Amendment, his right to procedural due process, and his Eighth Amendment right to be free of cruel and unusual punishment. The district court held a hearing at which respondent appeared pro se. The court subsequently entered judgment for petitioners, holding that respondent had failed to prove the allegations in his complaint and that his claim for injunctive relief was moot because he had been released from segregation. App., *infra*, 61a-62a.

The court of appeals reversed in part (App., *infra*, 60a-72a). It upheld the district court's determination that respondent's claim for an order directing his release was moot, and it concluded that petitioners were entitled to judgment on respondent's due process claim. With respect to the First and Eighth Amendment claims, however, the court of appeals held that the district court had erred by prematurely terminating respondent's evidentiary presentation. The court therefore remanded the case to the district court for further consideration of those claims.

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unable to bathe as frequently as those in the general population, was unable to request food that complied with his religious dietary restrictions, and received no vocational training.

Following a trial, the district court entered a declaratory judgment stating that respondent's confinement in segregation violated the Eighth Amendment; the court denied all of respondent's other claims for relief (App., *infra*, 106a-124a). The court of appeals again reversed in part (*id.* at 45a-59a). The court of appeals first held that petitioners were entitled to immunity from damages liability on respondent's First Amendment claim because "the specific right at issue here—that of a prisoner to refuse an order requiring him to handle foodstuffs forbidden by his religion—was not 'clearly established' in October 1972" (*id.* at 51a).[3]

Turning to respondent's Eighth Amendment claim, the court of appeals observed that " 'punishment which is disproportionate to the offense committed constitutes cruel and unusual punishment, whether imposed without or within prison walls' " (App., *infra*, 56a, quoting *Adams* v. *Carlson*, 488 F.2d 619, 635-636 (7th Cir. 1973)). The court found that "[a]t the very least, the period of [confinement for] nearly *seven months* from October 11, 1972 to May 5, 1973 was manifestly disproportionate to the offense of failing to perform work as instructed," especially in view of the religious reasons underlying plaintiff's refusal to perform the work (App., *infra*, 56a (emphasis in original)). The court of appeals held that the district court had erred by concluding that the

[3] The court of appeals directed the district court to consider respondent's entitlement under the First Amendment to expungement of the record of his punishment, and it found that respondent's other claims for injunctive and declaratory relief were moot (App., *infra*, 52a-54a). The district court subsequently ordered expungement of the punishment from respondent's records (*id.* at 95a-100a).

Eighth Amendment violation could not support an award of damages. It directed the district court to determine the extent to which respondent's confinement violated the Eighth Amendment and to calculate the damages to which respondent was entitled for that Eighth Amendment violation. *Id.* at 57a-58a.

The court of appeals further held that petitioners were not entitled to immunity from damages liability on the Eighth Amendment claim (App., *infra*, 58a-59a (footnote omitted)):

> There can be no serious contention with the fact that the right to be free from disproportionate punishment has long been "clearly established." At least as early as 1910, the Supreme Court declared it to be "a precept of justice" that punishment for crime must be proportioned to the offense, lest it be found to be cruel and unusual. *Weems* v. *United States*, 217 U.S. 349, 367 * * * (1910). This being so, the question becomes one of whether [petitioners] "knew or should have known" that their confinement of [respondent] to segregation was or became grossly disproportionate to the offense with which he had been charged. But this question almost answers itself, for if a point in time can be determined when the punishment became so seriously disproportionate as to violate the Eighth Amendment, at that time point [petitioners] "should have known" that the punishment was grossly excessive.

On remand, the district court stated that this Court's intervening decision in *Rummel* v. *Estelle*, 445 U.S. 263 (1980), "collide[d] with the mandates of [the court of appeals] and requires a total reconsideration of the Eighth Amendment issue in this

case" (App., *infra*, 101a).[4] The district court held "[i]n light of *Rummel*" that respondent's "length of stay in segregation did not work a violation of his rights under the Eighth Amendment to be free from cruel and unusual punishment" (*id.* at 105a).

The court of appeals again reversed the district court (App., *infra*, 40a-44a). It held that *Rummel* "limited judicial inquiry into whether statutorily prescribed punishments are proportionate to the offenses to which they are attached," but that "*Rummel* does not apply to the administratively prescribed punishment involved here" (App., *infra*, 44a). The court of appeals again directed the district court to award damages on respondent's Eighth Amendment claim.[5]

In considering the question of the amount of damages, the district court stated that "[a] determination of when [respondent's] punishment became disproportionate essentially requires this Court to sit as the adjustment committee hearing the refusal to work charges" (App., *infra*, 77a). After weighing the evidence that was before the adjustment committee, the district court held that respondent's

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[4] The case had been assigned to a different district judge on remand.

[5] On remand from that judgment, the district court entered an order dismissing respondent's Eighth Amendment claim on the ground that respondent's punishment could not be disproportionate in violation of the Eighth Amendment, because the punishment had been found to be unlawful under the First Amendment, but petitioners had been found to have immunity with respect to respondent's First Amendment claim (App., *infra*, 85a-87a). (The case was again assigned to a different district judge on remand.) The court of appeals again reversed and again directed the district court to award damages on respondent's Eighth Amendment claim (*id.* at 34a-39a).

confinement in segregation "became disproportionate after seven days" (*id.* at 78a). It awarded compensatory damages in the amount of $7,000 for the time respondent was confined in segregation, declined to award any punitive damages, and held that all petitioners other than petitioner Brown were personally liable for the damages awarded to respondent (*id.* at 82a, 84a).

3. The court of appeals affirmed by a divided vote (App., *infra*, 1a-33a). The majority concluded that respondent had suffered actual damage, that the amount of damages awarded was within the district court's discretion, that the district court did not err by declining to award punitive damages, and that petitioners each could be held personally liable for the injury to plaintiff. See *id.* at 6a-14a. The court of appeals rejected petitioners' claim that they were entitled to immunity from damages under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The court noted that it had rejected petitioners' claim of qualified immunity on the prior appeal, and stated that it "d[id] not believe that *Harlow* changes the 1978 result" (App., *infra*, 11a n.4).

Judge Easterbrook dissented (App., *infra*, 15a-33a). He first concluded that petitioners' actions did not violate the Eighth Amendment (*id.* at 18a-24a). He then stated that even if respondent's constitutional rights had been violated, petitioners were entitled to immunity from monetary liability. Judge Easterbrook stated that "[u]ntil the constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been 'clearly established' for purposes of *Harlow*" (*id.* at 25a). Because "[o]fficers of 'reasonable competence could disagree' about the propriety of [petitioners'] conduct in 1973," Judge

Easterbrook concluded that petitioners should have been found to be immune from monetary liability (*id.* at 27a (citation omitted)).

Petitioners filed a petition for rehearing and a suggestion for rehearing en banc. Both the petition and the suggestion were denied, with Judges Posner, Coffey, Flaum, and Easterbrook voting to grant rehearing en banc. See App., *infra*, 127a-128a.

REASONS FOR GRANTING THE PETITION

This Court held in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), that a government official's entitlement to immunity from personal liability in an action seeking damages for alleged violations of the Constitution turns upon the objective reasonableness of the official's actions. An official may be deprived of his immunity only if he is found to have violated legal rules that were "clearly established" at the time of the challenged conduct (457 U.S. at 818-819). As the Court observed in *Harlow* (457 U.S. at 819 (footnote and citation omitted)),

> [w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

In its recent decision in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), this Court considered "the level of generality at which the relevant 'legal rule' is to be identified" for purposes of applying the *Har-*

low standard (slip op. 3). The Court observed that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation" (*id.* at 3-4). But "if the test of 'clearly established law' were to be applied at this level of generality," the Court stated, "it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*" (slip op. 4). The Court concluded that in order for a right to be clearly established within the meaning of *Harlow*, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent" (*id.* at 4-5 (citations omitted)).

The court below failed to apply that standard in the present case. Its conclusion that petitioners are not entitled to immunity rests solely on the determination that an abstract legal principle—the bar against disproportionate punishment—had been established at the time of the challenged action. Thus, the court stated (App., *infra*, 10a-11a n.4, 58a-59a) that respondent's right to be free of disproportionate punishment was clearly established because this Court in *Weems* v. *United States*, 217 U.S. 349, 367 (1910), indicated that the punishment for a crime must be proportional to the offense. As Judge Easter-

brook discussed in detail in his dissenting opinion (App., *infra*, 24a-27a), the court of appeals simply did not consider whether *Weems*' general discussion of proportional punishment was by itself sufficient to inform a reasonable official in the situation faced by petitioners "that what [petitioners were] doing violate[d] that right" (*Anderson*, slip op. 4-5).[6] Accordingly, the judgment of the court of appeals should be vacated and the case remanded to allow the court of appeals to conduct the proper immunity inquiry.[7]

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[6] The court of appeals cited two other cases in support of its rejection of petitioners' immunity defense. The first case, *Adams* v. *Carlson*, 488 F.2d 619 (7th Cir. 1973), was not decided until after respondent was released from segregation. It therefore provides no basis for concluding that respondent's Eighth Amendment right was clearly established prior to that time. The second case, *Bryant* v. *Harris*, 465 F.2d 365 (7th Cir. 1972), did not address the merits of any constitutional claim; it simply vacated the district court's sua sponte dismissals of several habeas corpus petitions and remanded the actions for further proceedings. In the absence of any ruling on the merits, *Bryant* obviously cannot be the basis for a clarification of any constitutional right.

[7] In our view, examination of the relevant case law makes clear that petitioners could not have known that their conduct violated the Eighth Amendment. As Judge Easterbrook observed in his dissenting opinion, "[t]he answer to the question 'was it clearly established in 1973 that the eighth amendment forbids "excessive" administrative punishments' is No" (App., *infra*, 27a). *Solem* v. *Helm*, 463 U.S. 277 (1983), was the first case in which this Court held a criminal sentence invalid on the ground that it was too long; prior decisions rejected claims that the Eighth Amendment closely limited a sentencing authority's discretion. See, *e.g.*, *Hutto* v. *Davis*, 454 U.S. 370 (1982); *Rummel* v. *Estelle*, 445 U.S. 263 (1980).

Moreover, as Judge Easterbrook noted, this Court "has not extended the principle of *Solem* to intra-prison sanctions, and

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of this Court's decision in *Anderson* v. *Creighton*, *supra*.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1987

Solem itself suggests that only outrageous punishments (life in prison for shoplifting) violate the eighth amendment. No court to this day has held that nine months in prison is cruel and unusual punishment for anything, even jaywalking. * * * And because [respondent] was not sent *to* prison for refusing to handle pork, but was just moved to a new cell *in* prison, the analogy to other cases under the eighth amendment is even weaker" (App., *infra*, 28a-29a (emphasis in original)). For these reasons, the court of appeals erred by concluding that petitioners were not entitled to immunity.

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 84-2842, 84-2913

EDWARD JOSEPH X. CHAPMAN,
PLAINTIFF-APPELLEE

v.

GEORGE W. PICKETT, WARDEN, U.S. PENITENTIARY, MARION, ET AL.,
DEFENDANTS-APPELLANTS

Argued March 31, 1986

Decided Sept. 15, 1986

As Amended Sept. 25, 1986

Before CUMMINGS, Chief Judge, CUDAHY and EASTERBROOK, Circuit Judges.

CUDAHY, Circuit Judge.

After refusing on religious grounds to clean pork off food trays, plaintiff, a prisoner at the federal penitentiary in Marion, Illinois, was held in segregated confinement for nine months. He filed suit contending that the punishment was excessive. After numer-

ous trials and appeals, this court determined that defendants—officials at the prison—had violated plaintiff's eighth amendment rights. On remand, the district court for the Central District of Illinois found defendants individually liable to plaintiff for $7,000. Defendants appeal the size of the award and the finding of individual liability. Plaintiff cross-appeals the award—arguing that it is too small—as well as the district court's failure to grant punitive damages. We affirm.

Edward Joseph X. Chapman was convicted in 1969 of armed robbery and sentenced to 20 years in prison. He was originally detained at the federal penitentiary in Lewisburg, Pennsylvania, then at Leavenworth, Kansas, before being transferred to the Marion Penitentiary on October 4, 1972. On October 9, 1972, Chapman was assigned to kitchen detail. This included removing trays from food carts and cleaning off the carts. Because the food trays had pork on them, plaintiff, a devout Black Muslim whose faith forbids any handling of pork, refused to perform the task. James E. Brown, the supervising officer, warned Chapman that if he did not complete his assignment he would receive a disciplinary citation. Chapman still refused and told Brown that the last person who had written a disciplinary report on him had been "blown out of an oven" at Leavenworth two months earlier.[1]

Brown filed a report with the prison's Adjustment Committee under Prison Code section 303, charging Chapman with "failing to perform work as instructed

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[1] In fact, an employee was involved in an oven accident at Leavenworth, but Marion officials were aware that Chapman was not suspected of involvement in the incident.

by supervisor." This report noted Chapman's religious grounds for refusing to work. The report also mentioned Chapman's remark about the Leavenworth incident, although Chapman was not charged with threatening an officer. That same day, an investigation by a member of the Adjustment Committee concluded that Chapman generally had a good attitude and noted that Chapman had found another prisoner to remove the pork and had afterwards completed the task. Chapman also performed his kitchen tasks the following two days without incident.

On October 11, 1972, the Adjustment Committee met on Brown's report and concluded that Chapman should be placed in segregated confinement for an indeterminate period. Thereafter, Chapman's status in segregated confinement was reviewed regularly. At one point, he wrote Warden George W. Pickett and requested immediate release and an explanation of why he was in segregation. This inquiry was not answered. On March 15, 1973, Warden Pickett received a copy of a letter dated March 9, 1973 from the Director of the Federal Bureau of Prisons, Norman A. Carlson, in which the director told Congressman Charles Rangel that prisoners should not be assigned to details involving the handling of pork if their religious beliefs forbade it. Despite this letter, Chapman remained segregated. He was returned to the general population on July 25, 1973, after spending 289 days in segregation.

While in segregation, Chapman had no social contact with other inmates. Many of his religious materials were confiscated and he had no opportunity to attend religious services. While prisoners in the general population were allowed out of their cells up to 12 hours a day, Chapman was only allowed out for

exercise a few times each week and then only for 15 to 30 minute intervals. He was unable to bathe as frequently as those in the general population, was unable to request food that complied with his religious dietary restrictions, and received no vocational training.

He initially filed suit in April 1973. After much litigation,[2] this court found Chapman's eighth amendment rights to have been violated by his extended con-

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[2] Chapman originally sought declaratory and injunctive relief and damages, alleging violations of his rights under the first amendment's free exercise clause, the fifth amendment's due process clause and the eighth amendment's prohibition against cruel and unusual punishment. After hearing from only two witnesses, the district court entered judgment for defendants on grounds that Chapman failed to prove any of the allegations in his complaint and that his claim for a mandatory injunction was moot because he had already been released from segregation. On appeal, this circuit affirmed the denial of a mandatory injunction ordering release but reversed the dismissal of claims for damages and for certain declaratory and prohibitory relief. *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974). The court held that Chapman had made a prima facie case for a first amendment violation, that he had received procedural due process and that the district court had erred in terminating testimony. The court made no determination on Chapman's eighth amendment claim due to the inadequacy of the record. It remanded the case for a new trial.

On retrial, the district court ruled that qualified immunity shielded defendants from Chapman's first amendment claim. It found that plaintiff's eighth amendment rights were violated but refused to award money damages because no actual damages were shown. On appeal this court affirmed the finding of an eighth amendment violation and the determination that the first amendment claim was barred by qualified immunity. The court reversed the finding that no actual damages had been shown.

finement in segregation. *Chapman v. Pickett*, 586 F.2d 22 (7th Cir.1978). The case was then remanded to the district court for determination of who was responsible for the eighth amendment violation, when the violation began and what damages Chapman should receive.[3]

The district court determined that segregating Chapman for more than one week for failure to work was impermissible. Based on prior awards for wrongful segregation, the district court determined that Chapman should receive $7,000. The court determined that the three members of the Adjustment Committee, Jack Culley, E.M. Cage and Earl Buzzard were individually liable because they made the determination that Chapman should be segregated for an indefinite period. The court found Deputy Warden Fred Frey liable for approving this indeterminate sentence. The court also found Warden Pickett liable, based on the specific facts to which he had stipulated. Pickett admitted having the authority to override the Adjustment Committee's determination. He admitted knowing of plaintiff's confinement after October 11, 1972. He also knew of Nor-

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[3] On remand the district court determined that no eighth amendment violation existed in light of *Rummel v. Estelle*, 442 U.S. 939, 99 S.Ct. 2879, 61 L.Ed.2d 309 (1979). *Chapman v. Pickett*, 491 F.Supp. 967 (S.D.Ill. 1980). This circuit reversed, ruling that *Rummel* did not apply to this case. *Chapman v. Pickett*, 645 F.2d 73 (7th Cir. 1980) (unpublished order). The court found that the district judge had departed from the law of the case and again remanded for a determination of when plaintiff's eighth amendment violation began and a calculation of what damages were appropriate. *Chapman v. Pickett*, 676 F.2d 697 (7th Cir. 1982) (unpublished order).

man Carlson's letter stating that individuals should not be forced to handle meat in violation of their religious beliefs.

The district court did not award plaintiff punitive damages, finding that the officers had not acted with malice and that they legitimately believed that Chapman had threatened Officer Brown. Defendants now appeal the award of more than nominal damages to Chapman, contending that evidence of Chapman's threat should be considered in assessing the reasonableness of his confinement. Defendants also contend that they should not be held individually liable. Chapman cross-appeals contending that the award of actual damages was too small in light of the length of his confinement and claiming that his treatment warranted punitive damages.

I.

Defendants first argue that Chapman is not entitled to more than nominal damages because, even if he was wrongfully confined for refusing to work on religious grounds, his comment that the last man who had written a disciplinary report on him had been blown out of an oven provided a reasonable basis for his long-term segregation. Defendants note that this comment was in Officer Brown's report and was admitted by Chapman before the Adjustment Committee. As Chapman was an armed robber confined in a maximum security prison, defendants contend, it was reasonable to take his comment seriously and keep him under stricter supervision for 289 days. Thus, under *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)—which holds that damages are only recoverable when a deprivation of a right would not have occurred absent a constitutional vio-

lation—they conclude that Chapman is entitled to no more than nominal damages.

In raising this argument, defendants attempt to circumvent the settled law of this case. In 1978, this circuit stated:

> Defendants assert that Chapman's remarks concerning the supervisor at Leavenworth properly may have been considered in determining the length of Chapman's confinement, even though defendants admit the Leavenworth investigation of the oven incident did not raise Chapman as a suspect. If the prison authorities had wished to charge Chapman with threatening another with bodily harm, they could have done so; it was, in fact, a separately listed "Prohibited Act" under Prison Code § 004. No such charge was ever made, nor was any hearing regarding it ever held. Defendant Pickett did not even reply to Chapman's request for a formal explanation of his confinement. The mere fact that the remark was listed in the violation report and the investigator's report is not sufficient. Not having been communicated to Chapman as a ground for the decision, it may not properly be relied on as justifying the punishment of indeterminate segregation.

Chapman v. Pickett, 586 F.2d 22, 28 n. 4 (7th Cir. 1978). Never in the nine months of his segregation did any of the defendants profess that the remark was the reason for Chapman's being penalized. Moreover, the officials knew that Chapman was not suspected of causing any harm to the employee at Leavenworth. We can only conclude that Chapman was punished solely for the offense he was charged with

—failing to perform work as instructed by his supervisor. As the Adjustment Committe explained in its Committee Action Report of October 11, 1972:

> The inmate stated that he has a Muslim order and that he always follows them to the letter. It forbids one from being around pork much less touch or eat. It is Allah's way. Now that he is in our house he will do as he is told.

Appendix for Plaintiff-Appellee, Cross-Appellant at A-28. As a result of this determination, Chapman was kept in virtual isolation for nine months with severe restrictions on his mobility and daily routine. We cannot say that Chapman did not suffer actual damage.

II.

Granting that Chapman has suffered actual damage, it is appropriate to consider his argument that he should have received more than $7,000 in compensation for his injuries. He notes that in certain instances courts have overturned damage awards that were substantially out of line with awards in similar cases. *See Levka v. City of Chicago,* 748 F.2d 421 (7th Cir. 1984) ($50,000 award for victim of unwarranted strip search reduced as excessive); *Phillips v. Hunter Trail Community Association,* 685 F.2d 184 (7th Cir.1982) ($25,000 award for victim of Fair Housing Act violation reduced as excessive). Plaintiff points out that he received approximately $25 per day for his injuries while other victims of wrongful segregation have sometimes received more. *See Mary & Crystal v. Ramsden,* 635 F.2d 590 (7th Cir. 1980) ($80 per day damages to juveniles who were wrongfully confined); *United States ex rel. Larkins v. Oswald,* 510 F.2d 583, 584 (2d Cir.1975) ($80 per

day damages to segregated prisoner who was subjected to strip search and probing of his anal cavity); *Maxwell v. Mason*, 668 F.2d 361 (8th Cir.1981) ($100 per day for wrongful detention in solitary confinement).

The district judge sitting as factfinder has broad discretion in assessing damages. *See Saxner v. Benson*, 727 F.2d 669, 72-73 (7th Cir. 1984) ("In view of the general restrictions on appellate review of a jury's award of monetary damages we will not substitute our judgment in these circumstances for that of the judge and jury who heard the testimony."), *aff'd sub nom. Cleavinger v. Saxner*, —— U.S. ——, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985); *Phillips v. Hunter Trail Community Association*, 685 F.2d at 191. His findings will not be overturned unless found to be clearly erroneous. Plaintiff contends that the decision here was clearly erroneous because some prisoners received damages more than four times per day greater than what he received.

An individual can always point to cases in which others received more and say that he received too little. To accept that argument is to say that a court must match the most generous offer made elsewhere, even though the circumstances of the case before it may be different and even though it may be the higher awards that less accurately reflect actual damages. In cases of wrongful segregation, at least one other court has awarded sums to victims of wrongful segregation similar to what Chapman received. *See Riley v. Johnson*, 528 F.Supp. 333, 343 (E.D.Mich. 1981) ($25 per day). While some courts have awarded larger amounts, this may have been due to factors not present in Chapman's case. For example, the plaintiffs in *Mary & Crystal v. Ramsden* were

juveniles. The plaintiff in *United States ex rel. Larkins v. Oswald* was marched naked to his cell and subjected to a strip search and the probing of his anal cavity. The district judge was aware of these cases when he calculated his award. We cannot say he abused his discretion.

III.

Chapman also seeks punitive damages. A court may award punitive damages "when the defendant's conduct is shown to be motivated by evil motive and intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). Here, the district court found that even though defendants' good faith belief that plaintiff had threatened an officer was not a basis for segregating Chapman, it did provide grounds for denying punitive damages. The award of punitive damages is also within the sound discretion of the district judge and his finding will not be disturbed.

IV.

The final issue raised on appeal is whether defendants may be held personally liable for plaintiffs damage.[4] A plaintiff may establish personal responsibil-

[4] Defendants claim they should be immune from liability. They initially argued that they were absolutely immune from liability but this argument was foreclosed by the Supreme Court's decision in *Cleavinger v. Saxner*, —— U.S. ——, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985), that members of prison disciplinary committees receive only qualified and not absolute immunity. The defendants now claim they should receive qualified immunity from liability for violations of plaintiff's eighth amendment rights. They did not advance a qualified

ity "if the official acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir.1982); *Wellman v. Faulkner*, 715 F.2d 269, 275 (7th Cir.1983). This test was clearly satisfied as to the three members of the Adjustment Committee and Associate Warden Frey. The members of the Adjustment Committee made the initial determination that plaintiff should be confined to seg-

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immunity argument before the district court in this case. In 1978, this circuit rejected defendants' qualified immunity argument and concluded:

> There can be no serious contention with the fact that the right to be free from disproportionate punishment has long been 'clearly established.' At least as early as 1910, the Supreme Court declared it to be 'a precept of justice' that punishment for crime must be proportioned to the offenses, lest it be found to be cruel and unusual. *Weems v. States*, 217 U.S. 349, 367 [30 S.Ct. 544, 549, 54 L.Ed. 793].

American Intern. Ins. Co. v. Vessel SS Fortaleza, 585 F.2d 22, 28 (7th Cir. 1978). Since that time the Supreme Court has decided *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). That case articulated an objective standard for determining qualified immunity. Under that test "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. We do not believe that *Harlow* changes the 1978 result. In 1972 it was established that excessive punishment in segregated confinement for the exercise of a religious right could subject prison officials to liability. *See Bryant v. Harris*, 465 F.2d 365, 367 (7th Cir. 1972).

regation. They met repeatedly during his time in segregation to review his case. While in a position to return plaintiff to the general prison population, they kept him in segregation for nine months. Associate Warden Frey participated in many of the meetings concerning Chapman's confinement. In his position as supervisor, he too had the power to correct plaintiff's wrongful confinement. Under similar circumstances in *Crowder* we found the personal responsibility requirement had been met:

> The evidence presented by Crowder indicated that both Moore and Devero sat as members of the disciplinary committee and, thus, participated directly in the "disciplinary hearings" by which Crowder was repeatedly sentenced to confinement in the D.O. seclusion unit. In addition, Crowder testified that Moore and Devero were directly responsible for denying his requests for legal assistance and legal materials. . . . Moreover, because Moore and Devero were personally accountable for reviewing the status of inmates held in D.O. seclusion, they could properly be held liable for an eighth amendment violation if, at any time, Crowder's continued confinement in D.O. seclusion became unlawfully disproportionate to the seriousness of his prison infractions.

687 F.2d at 1006.

Warden Pickett's personal liability presents a more difficult question. Courts have exacting standards for establishing supervisory officials' personal liability and hesitate to saddle supervisors with responsibility for decisions they did not make. The dissent points to cases that have not met these exacting standards

and apparently concludes that "supervisory officials are not liable for failing to intervene to ameliorate things." However, the law does not accord supervisors such sweeping freedom from liability. Rather, established law holds that under certain circumstances supervisors may be personally liable for failing to act when they have knowledge of a constitutional deprivation. *See Crowder v. Lash*, 687 F.2d at 1005; *Cf. McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir.1984) (failing to supervise subordinates may be actionable). The knowledge that is required is not only that a constitutional deprivation exists but also that the supervisor's personal action is necessary to set it right.

The requisite knowledge is present in this case. Warden Pickett stipulated to knowing of Chapman's confinement and doing nothing about it, even after he received a letter from the Director of Prisons—Pickett's own supervisor. He stipulated before the district court

> that among his duties was to see that discipline was maintained at the prison; that as chief officer of the prison Mr. Picket[t] had the authority to override the decisions of officers at the prison; that Mr. Picket[t] was aware of Plaintiff's placement in segregation on October 11, 1972 and that he was continued and confined there until July 25, 1973; that on March 15, 1973 Mr. Picket[t] received a copy of a letter from Norman A. Carlson, Director, Federal Bureau of Prisons to Representative Charles Rangel. The letter indicated, . . . "We have your letter of January 11, 1973 concerning Mr. Edward Chapman. In your letter we take exception to your

> statement of January 17, 1973, that men of the Black Muslim Faith at our facility were assigned the task of handling pork. We reviewed the situation and have communicated to the heads of the department of instructions not to assign individuals to details where they must work with pork as it is against their religious beliefs."

Transcripts of Proceeding Before District Court, Nov. 3, 1976 at 95.

Pickett was the official at Marion to receive Director Carlson's communication, which should have put him on notice that Chapman was wrongfully segregated. While that placed him in the best position to know that a constitutional deprivation had occurred and while he had the authority to remedy the situation, he did nothing. Chapman remained in segregated confinement for more than four more months. Under these circumstances, the district court was entitled to find Warden Pickett personally liable and we cannot say this disposition was clearly erroneous.[5]

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[5] The dissent is in all other particulars an attack on *Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978). None of the points raised by the dissent (apart from the immunity arguments) has been argued by the government here for the very good reason that, except under rare circumstances, one panel of this court may not overrule a result reached by another panel. *See Devines v. Maier*, 728 F.2d 876, 880 (7th Cir.), *cert. denied*, 469 U.S. 836, 105 S.Ct. 130, 83 L.Ed.2d 71 (1984); *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 607 (7th Cir. 1980) ("we have long held that 'matters decided on appeal become the law of the case to be followed . . . on second appeal, in the appellate court, unless there is plain error of law in the original decision.' ") (quoting *Kaku Nagano v. Brownell*, 212 F.2d 262, 263 (7th Cir. 1954)). The law of the case doctrine has an extremely per-

For the foregoing reasons the judgment of the court below is AFFIRMED.

EASTERBROOK, Circuit Judge, dissenting.

This first amendment case has turned into an eighth amendment one because of the court's holding in 1978 that the defendants have qualified immunity from damages for punishing Chapman on account of his religious beliefs. 586 F.2d 22, 25-26. The extent to which public officials may or must accommodate sincere religious beliefs has produced a series of cases that are hard to reconcile and apply. These cases divide the Justices deeply. E.g., *Bowen v. Roy*, —— U.S. ——, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986); *Goldman v. Weinberger*, —— U.S. ——, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986). See also *Caldwell v. Miller*, 790 F.2d 589, 597-600 (7th Cir. 1986); Michael W. McConnell, *Accommodation of Religion*, 1985 Sup.Ct.Rev. 1. A humane prison administration accommodates religious beliefs when assigning jobs, as the Bureau of Prisons now does, but it was not clear in 1972 that it had to. I do not think it is clear today, given cases such as *Goldman* and the fact that a prisoner is more like a member of the military than of free society. See also *Madyun v. Franzen*, 704 F.2d 954, 958-60 (7th Cir.1983). This

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suasive rationale in this case as in others, and one can hardly imagine a matter more fraught with Pandora's Box potential than reopening the judgments reached by prior panels in the same case. The "change of law" rationale offered by the dissent for its extraordinary exploration of closed matters seems to us, under the circumstances of this case, a license to second-guess, or apply hindsight, to any number of otherwise settled decisions of this court.

establishes the immunity of the defendants from damages under the first amendment.

This left for decision in 1978 the claim that nine months in segregation is "excessive" for the offense of refusing to handle pork in the kitchen. The panel both found a violation of the eighth amendment and rejected the defendants' claim of immunity, stating: "At least as early as 1910, the Supreme Court declared it to be 'a precept of justice' that punishment for crime must be proportioned to the offense, lest it be found to be cruel and unusual. *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 549 54 L.Ed. 793 (1910). This being so, the question becomes whether defendants 'knew or should have known' that their confinement of Chapman to segregation was or became grossly disproportionate to the offense with which he had been charged. But this question almost answers itself, for if a point in time can be determined when the punishment became so seriously disproportionate as to violate the Eighth Amendment, at that same point defendants 'should have known' that the punishment was grossly excessive. Thus, . . . the defense of qualified official immunity is not available for damages arising out of Chapman's Eighth Amendment claim." 586 F.2d at 28-29.

Several components of this decision are untenable. One is that "excessively long" separation from the general population of a prison violates the eighth amendment. A second is that the general enunciation of a right—such as "let the punishment fit the crime"—is the sort of clear articulation that dissipates immunity. A third is that by 1973 this general right had been applied to prison discipline. A fourth is that official immunity does not apply to violations of the eighth amendment.

The majority does not discuss these holdings, on which its judgment depends, even though the defendants maintain that the immunity holding in 1978 is incorrect and should be reviewed in light of more recent cases. My brethren rely on the law of the case.[1] It is unwise for one panel to undo the work of another in the same case. Litigants should be able to assume that panels of this court are alike. Otherwise they will spend their time (and ours) trying to convince each panel to follow or upset the last decision. The law of the case is a salutary doctrine even when a judge believes that an earlier decision is wrong. Yet the doctrine has exceptions, the most important being for intervening changes in the law. See *Arizona v. California*, 460 U.S. 605, 618-19 & n. 8, 103 S.Ct. 1382, 1391 & n. 8, 75 L.Ed.2d 318 (1983); *Cameo Convalescent Center, Inc. v. Percy*, 800 F.2d 108, 109-10 (7th Cir.1986); *Chicago & North Western Transportation Co. v. United States*, 574 F.2d 926, 930 (7th Cir.1978). See also, e.g., *Devines v. Maier*, 728 F.2d 876, 880 (7th Cir. 1984) (discussing an exception for clear error in the earlier decision, error that usually becomes "clear" because of intervening decisions); *Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051, 1056 (7th Cir. 1986) (a decision that is "manifestly incorrect" may be reexamined even when there has not been an intervening change of law). Although the majority's

[1] Chapman also contends that the defendants have not preserved these issues, because they did not raise them in the district court after the decision of 1978. They have done what they must, however. A litigant need not pester the district court with requests to violate the court of appeals' mandate in order to preserve the right to ask the appellate court to reexamine its earlier holdings.

opinion applies the principles that have been established in the earlier opinions in this case, it is appropriate to reexamine these principles in light of decisions after 1978 and a few earlier decisions that the panel overlooked in 1978. The portion of that decision based on the eighth amendment is wrong in just about every particular. It ought not stand. Moreover, the majority introduces a new error, which I discuss at the end of this opinion.

1. *Weems*, which the panel cited in 1978 for the proposition that "excessive" punishments are forbidden, was a case about prison conditions, life at hard labor in chains, rather than about the duration of confinement alone. The other applications of the eighth amendment to prisoners also are about conditions—about the amount of space a prisoner has, about the quality of the food, about medical care, about freedom from injury. E.g., *Whitley v. Albers*, —— U.S. ——, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Caldwell*, 790 F.2d at 600-01; *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1986); *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985). If Chapman had been sent to a hellhole, he would have a claim under the eighth amendment. But segregation at Marion is not infernal. Many prisoners stay a lot longer than nine months in Marion's Control Unit, which is worse. Chapman does not contend that the conditions of segregation independently violated the Constitution.

If the conditions of segregation at Marion are within the tolerable range, and if damages are not the appropriate response to the *reason* Chapman was put in segregation—as we must assume given the holding that Chapman is not entitled to relief under

the first amendment—then the duration of the segregation was not unconstitutional. Chapman did not tell the prison officials that he would start clearing the dishes. He held to his beliefs. Every day Chapman was in segregation was a day on which he would have refused to handle pork. So if the eighth amendment establishes a principle of proportional length of differential treatment within a prison, the defendants did not transgress against it. This was no more a violation of the eighth amendment than nine months' confinement of a recalcitrant witness before a grand jury would be.

The most substantial problem with our 1978 decision, however, is its assumption that a prisoner has *any* legally protected interest in enjoying the same conditions of confinement as other prisoners. Chapman did not serve an extra day because of his refusal to handle pork. He simply had less pleasant conditions. Suppose he had been transferred from a minimum security prison to Marion because of his refusal to do assigned work. His loss would have been greater than the difference between the general population and segregation at Marion. It is established, however, that a conviction for crime allows executive officials to place prisoners where they will, to subject them to the range of conditions in the Nation's many prisons. *Meachum v. Fano*, 427 U.S. 215, 224-25, 96 S.Ct. 2532, 2538-39, 49 L.Ed.2d 451 (1976); *Moody v. Daggett*, 429 U.S. 78, 88 n. 9, 97 S.Ct. 274, 279 n. 9, 50 L.Ed.2d 236 (1976); *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983).

The question about "disproportionate sentences" under the eighth amendment is whether a state has deprived a person of his liberty for too long, given the nature of the offense. There is a big difference

between being in and being out of prison. Chapman's natural liberty, though, was not hanging in the balance. His liberty to select where and how he would live had been extinguished by the judgment of conviction. See *Hudson v. Palmer*, 468 U.S. 517, 524-28, 104 S.Ct. 3194, 3199-3201, 82 L.Ed. 2d 393 (1984). That is why the Court held in *Meachum* that a conviction authorizes the state to confine a prisoner in any of its institutions, even though one may be much less pleasant than another. For the same reason a state may confine its prisoners in any cell within a prison or change the prisoner's regimen—individual meals in segregation instead of group meals in the general population, fewer showers, less exercise, and so on. *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983) (segregation within a prison "is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration"). There is no constitutional difference between segregation and the general population; prisoners have no entitlement that prisons have "general populations", as our recent decisions sustaining the "lockdown" of the entire population at Marion for more than nine months shows. *Caldwell*, 790 F.2d at 600-05.

The panel did not discuss these principles in 1978. It did not cite *Meachum* and similar cases. *Hewitt*, which held that a prisoner does not have a constitutional interest in remaining in the general population, was not decided until 1983. True, *Meachum* and *Hewitt* interpreted the fourteenth rather than the eighth amendment. Yet these cases are not accidents of pleading. The Court would not have rendered a different decision if the prisoners had argued their cases under the eighth amendment instead of

the due process clause of the fourteenth. After all, the eighth amendment applies to the states only to the extent it has been "incorporated" in the due process clause of the fourteenth. *Meachum*, *Hewitt*, *Hudson* (holding that prisoners have no legitimate expectation of privacy), and similar cases establish that the Constitution does not entitle prisoners to live in the best conditions a prison has to offer.

The state may *create* protected interests. It may, for example, adopt rules providing that people will be sent to Marion (or closer confinement within Marion) only on account of misconduct. Rules restricting the discretion of officials may establish legitimate claims of entitlement of which prisoners may be deprived only with due process of law. The Court ultimately held in *Hewitt* that Pennsylvania's regulations created a legitimate claim of entitlement to remain in the general population even though the Constitution of its own force does not. See also *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 2d 935 (1974), and the treatment of *Wolff* in *Meachum*, 427 U.S. at 225-27, 96 S.Ct. at 2538-40. The question from this perspective is whether rules restricted the discretion of the defendants to put Chapman in segregation for refusing to work. In 1980 we remarked on the difference between process and substance in prison discipline, implicitly repudiating the premises of our 1978 decision. *Bono v. Saxbe*, 620 F.2d 609, 611-12 (7th Cir.1980), holds that the due process clause rather than the eighth amendment governs the duration of segregated confinement at Marion, unless the conditions of confinement are unconstitutionally harsh.[2] Ours is not a due process

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[2] *Bono* replaces the eighth amendment analysis with one styled "substantive due process", see 620 F.2d at 615-18, and

case. Chapman had a hearing. He does not contend that the hearing was procedurally defective or that the defendants lacked authority under the regulations then in force to put him in segregation. He therefore cannot recover under the due process clause, and he does not seek to do so.

There is one more way in which this case may be argued under the eighth amendment. If the prison officials *knew* that they had no basis to punish Chapman, but they put him or kept him in segregation vindictively, this might state a claim. Prison officials must have some reason to impose punishment, if they set up rules confining their discretion. *Superintendent of Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). The prison officials had reason to punish Chapman. He defied a direct order and said he would defy it again. He gave a reason for disobedience, but under our 1978 decision the defendants have immunity from damages on account of their refusal to accept his reason. It is as if Chapman had been put in segregation for refusing to press green shirts in the laundry, proclaiming that green shirts look better crinkled. Involuntary servitude is the portion of convicts, the thirteenth amendment says. A prisoner who decides he will

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this replacement is as inconsistent with *Meachum*, *Moody*, *Hewitt*, and *Olim* as is our 1978 case. *Hewitt* knocked the struts out from under *Bono* by holding that the Constitution does not independently regulate transfers to segregation; an analysis based on "substantive due process" assumes the contrary. See also *Gumz v. Morrissette*, 772 F.2d 1395, 1405-09 (7th Cir. 1985) (concurring opinion), *cert. denied*, —— U.S. ——, 106 S.Ct. 1644, 90 L.Ed.2d 189 (1986). But this is not the time to deal with substantive due process, which Chapman has not invoked. See also note 3 below.

work only on terms satisfactory to himself must expect his confinement to become even more onerous than it was. Chapman's disobedience is justification for discipline under Marion's rules. More, the district court found that the prison officials did not act maliciously or vindictively; this is the basis on which the court denied punitive damages. This potential source of liability is foreclosed.

Marion is an explosive place. It is the Nation's maximum security prison, populated by violent and intractable offenders who could not adjust to life in other prisons. Administrators of prisons have hard tasks. They cannot control the population without authority over it, yet every exercise of authority may expose them to liability. The Supreme Court has said over and again that courts should respect prison officials' exercise of judgment. We have said over and again that the officials at Marion, whose task is especially difficult, deserve especial deference. E.g., *McCollum v. Williford*, 793 F.2d 903 (7th Cir. 1986) (Marion may discipline prisoners on the basis of reports withheld even from the disciplinary committee, although that might be impermissible at other prisons). Officials may respond to judicial orders reducing their discretion by exerting control in other ways. They can change the way the prison is organized. There will be no more disobedience at Marion during work details. Work has been cancelled. Guards or contractors clean the dishes and press the shirts. The prisoners stay locked in their cells. I doubt that they count the trade a gain.

It is hard to imagine a rule more enervating than one that allows a prisoner to collect damages from his keepers on the ground that they should have returned him to the general population, after an admitted of-

fense, in six months rather than nine, or perhaps in three weeks rather than four. This transfers effective authority from the warden to a jury; it increases the risk of taking firm measures. The prison's officials will not know what they may do until the case is over and the decision has been rendered on appeal. Yet if administrators react to this threat to their wallets by going easy on misconduct, the result may be the deaths of prisoners and guards alike. There have been too many deaths at Marion to be sanguine about lax discipline. The Framers did not decide in 1789 (when Congress sent the Bill of Rights to the States) or 1791 (when Virginia provided the ratification necessary to put the first ten amendments into effect) to commit to juries the question whether a prisoner's separation from the general population lasted too long in light of the seriousness of his offense. We have no authority to decide so today.

2. Assume now that this is wrong, that Chapman spent an unconstitutionally long time in segregation. The defendants are entitled to immunity from liability in damages unless their acts violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). See also *Cleavinger v. Saxner*, —— U.S. ——, 106 S.Ct. 496, 504, 88 L.Ed.2d 507 (1985). The panel thought in 1978 that *Weems* had "clearly established" that "excessive" punishments are unconstitutional.

This is sleight of hand. It is always possible to state the constitutional right at a level so general that it "clearly establishes" the right in question. If a question arises, such as whether an Attorney Gen-

eral may authorize a national security wiretap without a warrant, a court could reply that the Supreme Court established a presumption in favor of warrants, and in 1967 the Court applied this to the interception of telephone conversations. So by the time Attorney General Mitchell came to office, it was "clearly established" that there had to be a warrant for an interception. This was not, however, the method the Supreme Court used to decide the case. It asked instead when the general rule had been made specific—that is, when the Court first held that national security wiretaps require a warrant. See *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 2818-20 & n. 12, 86 L.Ed.2d 411 (1985). Similarly, if a question arises whether an affidavit establishes probable cause to obtain a warrant, a court could say: "It has long been established that you need probable cause to get a warrant, so if you got a warrant without probable cause you are liable." But "probable cause" is too general. In *Malley v. Briggs*, —— U.S. ——, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the Court concluded that the right question is whether a well trained and careful official should have known that his conduct would be viewed as unconstitutional in light of the available precedents. It wrote: "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." 106 S.Ct. at 1096; see also *id.* at 1098-99.

Until the constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been "clearly established" for purposes of *Harlow*.

In several cases since 1978 we recognized this. E.g., *Zook v. Brown*, 748 F.2d 1161, 1165 (7th Cir.1984); *Coleman v. Frantz*, 754 F.2d 719, 730 n. 15 (7th Cir.1985); *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir.1985); *Benson v. Allphin*, 786 F.2d 268, 275-76 (7th Cir.1986). *Azeez v. Fairman*, 795 F.2d 1296 (7th Cir.1986), is the most recent, and its discussion is dispositive (*id.* at 1301): "The words 'clearly established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of a claim based on (for example) the First Amendment's free exercise of religion clause, however novel that claim is, can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly established constitutional right. The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." See also *Hobson v. Wilson*, 737 F.2d 1, 26 (D.C.Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985). Our decision of 1978 is a derelict—in this circuit anyway. I recognize that it has company in other circuits, e.g., *Creighton v. City of St. Paul*, 766 F.2d 1269 (8th Cir.1985), *cert. granted* under the name *Anderson v. Creighton*, —— U.S. ——, 106 S.Ct. 3292, 92 L.Ed.2d 708 (1986), but these decisions predate *Malley* and do not explain why it is appropriate to take a broadly phrased right as "clearly establishing" a particular application. Our court should attorn to the standard of *Azeez*, under which the law in 1972-73 had not "clearly established" that

the eighth amendment forbids "excessive" terms of segregated confinement within a prison.[3]

Officers of "reasonable competence could disagree" (*Malley*, 106 S.Ct. at 1096) about the propriety of their conduct in 1973. As this opinion shows, judges still disagree about the constitutional standards. The defendants will take cold comfort in knowing that they have been found liable—on the ground that no reasonably well trained person could have believed they were entitled to act as they did—for doing something that the district court thought they were entitled to do (our decision in 1978 reversed the district court) and that at least one judge of this panel thinks the Constitution allows them to do. Cf. *Nix v. Williams*, 467 U.S. 431, 350-51, 104 S.Ct. 2501, 2512-13, 81 L.Ed.2d 377 (1983) (White, J., concurring).

3. The answer to the question "was it clearly established in 1973 that the eighth amendment forbids 'excessive' administrative punishments" is No. It is

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[3] The panel intimated in 1978 that the prison officials should have released Chapman to the general population soon after the Bureau of Prisons adopted its policy against assigning people to handle foods forbidden them by their religions. This amounts to saying that the administrative rules of the prison system "established" the constitutional right. *Davis v. Scherer*, 468 U.S. 183, 194 & n. 12, 104 S.Ct. 3012, 2019 & n. 12, 82 L.Ed.2d 139 (1984), holds otherwise. *Davis* establishes that only when the rule establishes the claim for relief sued upon does a violation of a "clear" rule abrogate an immunity. See also *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 434 (7th Cir. 1986). Chapman is not entitled to recover damages on account of a violation of the Bureau of Prisons' internal rules, especially a rule that was adopted after he had been put in segregation and that does not mention the appropriate treatment of prisoners in Chapman's position. It is the eighth amendment or nothing.

not so established today. It certainly was not so established in 1973. Not until June 1983, when it decided *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637, did the Supreme Court hold a criminal sentence invalid because too long. Earlier cases had held that the length of a punishment, as opposed to its character (torture, death, and so on), is a matter for the judgment of the legislature and the sentencing court. E.g., *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982); *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980); *Badders v. United States*, 240 U.S. 391, 395, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916); *Howard v. Fleming*, 191 U.S. 126, 136, 24 S.Ct. 49, 50, 48 L.Ed. 121 (1903). *Hutto* and *Rummel*, decided after 1978, show that the eighth amendment does not authorize federal courts to insist that punishments be finely proportioned to the crime. The Supreme Court has not extended the principle of *Solem* to intra-prison sanctions, and *Solem* itself suggests that only outrageous punishments (life in prison for shoplifting) violate the eighth amendment. No court to this day has held that nine months in prison is cruel and unusual punishment for anything, even jaywalking.[4] Statutes often authorize misdemeanors, a rag-tag collection of small offenses, to be punished by a year's imprisonment. And because Chapman was not sent *to* prison for refusing to handle pork, but was just

[4] I put to one side the remark in *Robinson v. California*, 370 U.S. 660, 667, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962), that one day is cruel and unusual for the crime of having a common cold. Colds imprison the best of us, and at all events the case dealt with the minimum requirements for criminal punishment, not with the duration of imprisonment in relation to the gravity of the offense.

moved to a new cell *in* prison, the analogy to other cases under the eighth amendment is even weaker.

The only case that arguably makes the right in question sufficiently particular is *Adams v. Carlson*, 488 F.2d 619, 635-36 (7th Cir. Aug. 23, 1973), which the panel in 1978 said (586 F.2d at 27) establishes that any "disproportionate" punishment in prison is unconstitutional. *Adams*, based on principles of procedural due process, preceded *Meachum*, *Moody*, and *Hewitt*. It is no longer authoritative. *Adams* did not hold that the eighth amendment directly limits the duration of segregation from the general population. Its discussion of the eighth amendment melds principles of due process with those of proportionality, and it ultimately holds that the claims before it under the eighth amendment were not ripe for adjudication. A decision concluding that it could not resolve the dispute at hand—that Article III forbade a disposition on the merits of the eighth amendment claim—cannot "clearly establish" any legal principles, not unless advisory opinions have become the law of the land.

More to the point, *Adams* was decided after Chapman had been released from segregation! The case arose out of a prison disturbance at Marion, whose officials summarily confined a number of prisoners in indefinite segregation. The prisoners sought an injunction to compel their release. The district court held that this confinement did not violate the constitutional rights of the prisoners. *Adams v. Carlson*, 352 F.Supp. 882, 891-94 (E.D.Ill. Jan. 15, 1973). At the time the defendants decided to keep Chapman in segregation, then, they had recently been told by a district court that prisoners at Marion had no constitutional rights that impeded lengthy segregation. It

is beyond me how the defendants were supposed to know the opposite—let alone how the opposite could be said to have been "clearly established" in the spring of 1973. See also *Benson*, 786 F.2d at 278.

4. Our decision of 1978 suggested that there can be no immunity when the right in question is the eighth amendment. The Ninth Circuit apparently takes this view. Compare *Haygood v. Younger*, 718 F.2d 1472, 1483-84 (1983), modified en banc, 769 F.2d 1350, 1358-59 (1985), with *Albers v. Whitley*, 743 F.2d 1372, 1376, (1984), rev'd on other grounds, —— U.S. ——, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). Another panel of this court has applied the *Harlow* standard of immunity to a violation of the eighth amendment, however, see *Joseph v. Brierton*, 739 F.2d 1244, 1249-50 (7th Cir. 1984), although it rejected the defense on the facts presented, and at least two other circuits hold that officials who violate the eighth amendment may be immune from liability in damages. *Sampson v. King*, 693 F.2d 566 (5th Cir.1982); *McCray v. Burrell*, 516 F.2d 357, 370-72 (4th Cir.1975) (en banc).

The *Harlow* standard logically applies to cases under the eighth amendment. The definition of the violation sometimes includes a mental element (such as "deliberate indifference", see *Whitley* and *Duckworth*), but the test under *Harlow* is objective, so that the mental element does not dispose of the immunity question. It is quite consistent to say that the defendants *wanted* Chapman to suffer, or were indifferent to whether he did, and that a reasonable person would have believed in 1973 that the infliction of punishment was lawful. The police officer who shoots a fleeing subject wants to injure that person, but it does not follow that the officer never can claim

immunity for wrongful use of force. If a reasonably well trained officer (*Malley*, 106 S. Ct. at 1098) would have concluded that it was permissible to use force, the defendant's subjective intent to inflict pain does not abrogate the immunity. So here. If a reasonably well trained warden or disciplinary committee would have thought in 1973 that it was permissible to keep someone in segregation for nine months for a nonviolent (but deliberate) infraction of the prison's rules, an infraction the prisoner had pledged to repeat, then there should be qualified immunity. Only when the presence of the mental element that defines the violation also shows that no reasonably well trained official could have thought his behavior proper, as in *Joseph v. Brierton*, is the existence of a violation incompatible with immunity.

5. The discussion so far explores my disagreements with the decision in 1978. I have one disagreement with the decision of today. The district court held former Warden Pickett liable along with his subordinates. No evidence in the record shows that Pickett authorized Chapman's segregation or approved its duration. The stipulation to which the majority refers shows only that the Warden knew that Chapman was in confinement and did nothing, even after receiving a letter stating that the Bureau of Prisons had adopted a policy relieving people of handling food to which they objected on religious grounds. The record does not show that the Warden read this letter (the stipulation says that he "received" it) or that wardens in federal prisons customarily review disciplinary cases in light of changing directives. For all the record shows, wardens leave these things, along with most of the other tasks of management, to their subordinates. Wardens es-

tablish policy and assign tasks; detail work and daily administration are among the tasks parcelled out.

The eighth amendment does not establish superiors' liability. A warden is liable only for what he does, not for what he fails to prevent his subordinates from doing. The division of labor and the delegation of functions within a prison are not unconstitutional. A warden asleep on the job will have to answer to his superiors, but dozing off on company time is not a violation of the Constitution. The proper defendants are those who put Chapman in segregation and, despite regularly reviewing his status, refused to let him out. We have held that supervisory officials are not liable for failing to intervene to ameliorate things. E.g., *Kunzelman v. Thompson*, 799 F.2d 1172-75 (7th Cir. 1986); *Walker v. Rowe*, 791 F.2d 507, 508-09 (7th Cir. 1986); *Ustrak v. Fairman*, 781 F.2d 573, 575-77 (7th Cir. 1986); *Duckworth v. Franzen*, 780 F.2d at 650; *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1390 (7th Cir. 1984); *Wellman v. Faulkner*, 715 F.2d 269, 275-76 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3587, 82 L.Ed.2d 885 (1984); *Crowder v. Lash*, 687 F.2d 996, 1005-06 (7th Cir. 1982); *Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981); *Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971). Some of these cases are very similar to this. In *Adams v. Pate*, for example, the court held that notice to a warden that a prisoner was being beaten did not justify damages when the warden did not take steps to prevent future beatings.

A prison may apportion responsibilities among officials without exposing supervisors to liability on the ground that they failed to prevent what the subordinates were doing. The majority does not recon-

cile its holding with the cases I have cited. The "clearly erroneous" doctrine, to which the majority refers, applies to facts and inferences; I do not think, however, that facts and inferences are disputed. The question is whether on stipulated facts the warden of a prison is liable for failing to prevent a violation of the eighth amendment by his subordinates. The stipulation of facts does not suggest, and the district court did not find, that Warden Pickett had either the personal role or the mental state required for a violation of the eighth amendment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*

No. 81-1809

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF-APPELLANT

vs.

GEORGE PICKETT, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Central District of Illinois, Danville Division

No. 75-C-2041—Judge Robert D. Morgan

January 4, 1982

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMAND~~ED~~, in accordance with the order of this Court entered this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*

No. 81-1809

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF-APPELLANT

vs.

GEORGE PICKETT, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Central District of Illinois, Danville Division

No. CV 75-2-041—ROBERT D. MORGAN, *Judge*

January 4, 1982

(Argued December 15, 1981)

ORDER

I.

This is the fourth time this case has been before the court. In 1973, Chapman filed a pro se civil rights action alleging: (1) violation of his First Amendment right to free exercise of religion, (2) denial of procedural due process at the disciplinary

hearing which preceded his segregation, and (3) cruel and unusual punishment in violation of the Eighth Amendment by assignment to segregation for more than nine months. In *Chapman* I, 507 F.2d 1246 (7th Cir. 1974), we remanded the case for a new trial.[1]

In *Chapman* II, 586 F.2d 22 (7th Cir. 1978), we reversed the trial court's finding as to the date an Eighth Amendment violation occurred and reversed the court's determination that Chapman was not entitled to damages.[2] On the second remand, the district court, 491 F. Supp, 967 (1980), found that *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133 (1980), was dispositive of the Eighth Amendment issue.[3]

In an unpublished order, December 12, 1980, we remanded holding that *Rummel v. Estelle* was not

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[1] Chapman's case was prematurely terminated before he had completed presentation of his case. We held that Chapman's release from segregation did not moot his claims for monetary, declaratory, or prohibitory injunctive relief.

[2] The facts of this case were set out in detail in *Chapman* II. We held that: (i) the defendants had official immunity as a defense to Chapman's First Amendment claim for money damages under the first prong of the test enunciated in *Wood v. Strickland*, 420 U.S. 308 (1975); (ii) defendants immunity from monetary damages based on the First Amendment claim did not render moot Chapman's claims for injunctive and declaratory relief; (iii) defendants qualified official immunity on the First Amendment claim did not extend to the Eighth Amendment violation and thus defendant had made out an Eighth Amendment violation.

[3] The court also ordered that the report of the incident and the disciplinary action taken against Chapman be expunged from his records. Injunctive relief was granted forbidding further use of such record.

applicable.[4] We stated that two issues remained in this case: (1) when the violation began, and (2) what the damage award should be. (*Chapman* III).

On remand, the court reviewed the record, briefs, and prior decisions, and found it unnecessary to conduct another evidentiary hearing. In an order entered April 20, 1981, the district court summarized the prior findings and found no cognizable Eighth Amendment claim and thus no entitlement to damages. In reaching this decision, the district court relied on language in *Chapman* I, 507 F.2d 1246, 1252-53, which read:

> Of course, if Chapman should be successful in demonstrating that the sole reason for his segregation was his refusal to obey an order that violated his First Amendment rights, there would be no occasion to reach the Eighth Amendment claim. For in that event the punishment would be entirely impermissible and no question of disproportionality would remain.

Because the defendants had qualified official immunity from damages for the alleged First Amendment violation, the district court held that Chapman was not entitled to damages. Chapman appeals the order of dismissal.

II.

The issue on appeal is whether the district court erred in finding that there was no Eighth Amendment violation and thus no entitlement to damages. We conclude that this was error.

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[4] *Rummel* limited judicial inquiry into whether statutorily prescribed punishments are proportionate to the offenses to which they are attached. *Rummel* does not apply, as here, to administratively prescribed punishment.

An appellate decision establishes the law of the case for all subsequent stages of the litigation. Thus, the trial court is restrained with respect to those issues that have been considered and resolved by the appellate court. *Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir. 1980). In *Chapman* II, 586 F.2d 22, 28 (1978), we stated that: "[i]t is questionable whether indeterminate segregation was at all appropriate for the type of offense charged. At the very least, the period of nearly seven months from October 11, 1972 to May 5, 1973 was manifestly disproportionate to the offense of failing to perform work as instructed, especially when viewed in light of the facts that the refusal was based on religious grounds. . . ." ". . . [A]s of March 9, 1973, the Bureau of Prisons had adopted a policy which prohibited assignment to kitchen clean-up detail of those prisoners who refused to handle pork on religious grounds; yet Chapman was not released from punishment for this 'offense' until over four months later. The district court should consider these facts on remand in determining the extent of the Eighth Amendment violation." Moreover, we stated that the conditions under which Chapman was confined should be translated into a realistic dollar figure as in *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978).

Our instructions on remand were to determine "when" Chapman's segregation became an Eighth Amendment violation. The district court had found a violation and this finding was affirmed in *Chapman* II. The district court found that Chapman's confinement constituted an Eighth Amendment violation as of May 5, 1973. We found that as of March 9, 1973 a policy of the Bureau of Prisons prohibited confinement for such "offense" as Chapman was charged.

Thus, the question is when will we charge defendants with notice or knowledge of their own prison regulations. *See Chavis v. Rowe*, 643 F.2d 1281 (7th Cir. 1981).

We reverse and remand for disposition in accordance with our order of December 12, 1980, *i.e.*, when the violation began, and what the damage award should be.

Circuit Rule 18 will apply.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. JOHN MINOR WISDOM, *Senior Circuit Judge* *

HON. RICHARD D. CUDAHY, *Circuit Judge*

No. 80-1640

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF-APPELLANT

vs.

GEORGE PICKETT, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of Illinois, Danville Division

No. 75-C-2041—Judge Harold A. Baker

December 12, 1980

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* Hon. John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Eastern District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED and REMANDED with instructions, in accordance of the order of this court entered this date.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. JOHN MINOR WISDOM, Senior Circuit Judge *

HON. RICHARD D. CUDAHY, Circuit Judge

No. 80-1640

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF-APPELLANT

vs.

GEORGE PICKETT, ET AL., DEFENDANTS-APPELLEES

Appeal from Eastern District of Illinois
No. 75-C-2041—Baker, Judge

Argued: November 3, 1980
December 12, 1980

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* Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

ORDER

This appeal marks the third time this case has come before the Court. Last time we affirmed the district court's conclusion that the appellant had suffered a violation of his eighth amendment right to be free from cruel and unusual punishment but remanded the case for reconsideration as to the extent of the violation and the amount of monetary damages plaintiff should recover. Chapman v. Pickett, 586 F.2d 22, (7th Cir. 1978). While the case was on remand, the United States Supreme Court decided Rummel v. Estelle, 1980, —— U.S. ——, 63 L.Ed.2d 382, 100 S.Ct. 1133. In the district court's view, *Rummel* dictated a reversal of the earlier finding of an eighth amendment violation. Because we assess *Rummel* differently, we reverse and remand.

Chapman, the appellant, was a prisoner at the Marion, Illinois federal penitentiary at the time this claim arose. While assigned to a kitchen detail, Chapman refused to handle pork because of the beliefs of his Black Muslim faith. His supervisor reported him for failure to perform work as instructed and a prison disciplinary committee decided to place Chapman in segregated confinement for an indeterminate period. He was not released from segregation until almost ten months later.

In holding that Chapman's eighth amendment rights had been violated, we applied the principle that "punishment which is disproportionate to the offense committed constitutes cruel and unusual punishment, whether imposed within or without prison walls". 586 F.2d at 27 (quoting Adams v. Carlson, 488 F.2d 619, 635-36 (7th Cir. 1973)). The Supreme Court's decision in *Rummel* does not require us to discard that principle. To be sure, *Rummel* has

limited judicial inquiry into whether statutorily prescribed punishments are proportionate to the offenses to which they are attached. But by its own terms, *Rummel* does not apply to the administratively prescribed punishment involved here. The rationale underlying the holding is that any inquiry into proportionality inevitably involves value judgments concerning the gravity of the offense and the severity of the punishment. Since legislatures, rather than courts, are the primary repositories of societal values, legislative choices concerning punishments for crimes are entitled to a substantial amount of deference. That rationale is simply not applicable here where the punishment decision was the product of administrative, not legislative, judgment.

Since *Rummel* has not undermined the basis for this court's earlier decision that the punishment imposed upon the appellant violated his eighth amendment rights, we reverse and remand to the district court for determinations on the only two issues that remain in this case: when the violation began and what the damage award should be. Our decision does not affect the unappealed holdings in the district court's opinion.

APPENDIX F

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 77-1859

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF-APPELLANT

v.

GEORGE PICKETT ET AL., DEFENDANTS-APPELLEES

Argued April 13, 1978

Decided Oct. 30, 1978

Before CASTLE, Senior Circuit Judge, and SWYGERT and SPRECHER, Circuit Judges.

SWYGERT, Circuit Judge.

In this case involving the constitutional rights of a federal prisoner, plaintiff-appellant Edward Joseph X. Chapman appeals the denial by the district court after a bench trial of his prayers for injunctive, declaratory, compensatory, and punitive relief. Chapman contends that defendants violated his First Amendment rights by punishing him for his refusal on religious grounds to handle pork during a kitchen cleanup detail. Finding that defendants enjoy a qualified official immunity from liability for dam-

ages and ruling that the adoption of a new policy by the Bureau of Prisons and plaintiff's release on parole mooted his requests for injunctive and declaratory relief, the district court refused to reach the merits of Chapman's First Amendment claim. Although agreeing with Chapman that the punishment he suffered was so disproportionate to the severity of the offense with which he was charged that it violated his Eighth Amendment rights, the district court ruled that he was not entitled to monetary damages because he had failed to show that actual damages were suffered. We affirm the district court's finding of qualified immunity on the First Amendment issue but reverse on the question of mootness. As to the Eighth Amendment claim, we affirm as to liability but reverse on the issue of damages.

I

Edward Joseph X. Chapman was a prisoner in the federal penitentiary at Leavenworth, Kansas when, on October 4, 1972, he was transferred to the Marion, Illinois penitentiary. On October 9 Chapman was assigned to the kitchen detail, which assignment included transporting food carts and clearing food off of them. When Chapman discovered that the food trays in the carts contained pork, he went to his supervisor, defendant J. E. Brown, and informed him that because of the beliefs of his Black Muslim faith, he could not handle the pork on the trays. According to his testimony at trial, Brown then offered Chapman the use of either gloves or various kitchen utensils to enable him to complete the task. While Chapman at trial denied that he was offered these, he did acknowledge that, regardless of such an offer, he would still have refused to do the

work, since even indirect touching was forbidden. Brown then advised Chapman that he would be forced to write a disciplinary report on Chapman if the task were not performed. Chapman responded by saying that the last man who had written a report on him concerning an incident of this nature had been "blown out of an oven" at Leavenworth just two months previously.

After the incident Brown filed a report charging Chapman with violating Prison Code § 303, "Failing to perform work as instructed by a supervisor." His report also mentioned the Leavenworth remark. An investigative report, completed the day of the incident by another official and sent to the prison's Adjustment Committee, stated that "Chapman had a very good attitude." It noted that "apparently through Chapman's efforts someone had removed the pork from the cart and Chapman had finished cleaning the cart."

On October 11 the Adjustment Committee, which included defendants Jack Culley, Earl Buzzard, and E. M. Cage, met to consider Brown's report. Chapman was present and, upon having the report read to him, admitted the facts of the incident, again explaining that his refusal was the result of his Black Muslim beliefs. The Committee decided to punish Chapman by placing him in the segregation unit for an indeterminate term.

Chapman's status in segregated confinement was reviewed periodically. At least once during this confinement Chapman sought a formal explanation of his confinement from defendant George Pickett, warden at Marion, and requested immediate release. No reply from Pickett was received. During Chapman's confinement on March 15, 1973, Pickett re-

ceived a copy of a letter dated March 9, 1973 from the Director of the Federal Bureau of Prisons, Norman A. Carlson, in which the Director stated to Congressman Charles Rangel that "We have re-examined the situation and have communicated to the heads of our facilities instructions not to assign individuals to the details where they must work with pork if it is against the religious beliefs of those men." Chapman was not returned to the general prison population, however, until July 25, 1973. While in segregation, Chapman did not eat foods containing pork. He was not provided with added portions of items not containing pork.

Prior to his release from segregation, Chapman instituted this action. Following a one-day hearing held on October 9, 1973, the district court for the Eastern District of Illinois entered judgment for defendants, ruling that Chapman's request for an injunction was mooted by his release from segregation and that Chapman had failed to prove his complaint. On appeal to this court we affirmed the denial of a mandatory injunction but otherwise reversed and remanded the cause for a new trial, finding that the claims for monetary, declarative, and prohibitive injunctive relief had not been mooted. *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974). We also found that the district court had prematurely terminated Chapman's presentation of evidence and had erred in concluding that Chapman had failed to prove a prima facie case. Following the remand, a new trial was held. The district judge found Chapman's confinement in segregation was excessive after May 5, 1973 and declared that this violated Chapman's rights under the Eighth Amendment. All other re-

lief prayed for by Chapman, however, was denied. Chapman then brought this appeal.

II

Chapman first appeals the district court's ruling that the defendants enjoy qualified official immunity from liability for the damages he claims to have suffered as a result of their violation of his First Amendment rights. The test currently employed to determine the availability of the official immunity defense was enunciated by the Supreme Court in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Although that case involved the immunity of local school board members, the same test was applied by this court to state correctional administrators in *Knell v. Bensinger*, 522 F.2d 720 (7th Cir. 1975). The Supreme Court recently approved this extension of the *Wood* test to prison officials and officers in *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d (1978).[1]

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[1] It may be noted that *Wood*, *Knell*, and *Navarette* all were 42 U.S.C. § 1983 cases against state officials, whereas the instant case is an action against federal officials based directly on the Constitution in the manner of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Butz v. Economou*, —— U.S. ——, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court approved the use of the test as developed in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), in cases involving the question of qualified official immunity of federal executive officials in *Bivens*-type cases. The *Wood* test for the applicability of the qualified immunity specified in *Scheuer* is utilized here because it is the test used by the Court in analyzing the immunity of state prison officials in *Navarette*.

As the Court states in *Navarette*, the test is essentially two-pronged:

> Under the first part of the *Wood v. Strickland* rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm.
>
> * * * *
>
> [T]he second branch of the *Wood v. Strickland* standard . . . would authorize liability where the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." This part of the rule speaks of "intentional injury," contemplating that the actor intends the consequences of his conduct.

Id. at 562, 566, 98 S.Ct. at 861-62. Since Chapman does not contend that defendants acted with malicious intentions, and since the record is devoid of evidence that defendants did so act, we are here concerned solely with the first prong of the *Wood* test.

One of the requirements of this test is that the constitutional right allegedly infringed by the defendants must have been clearly established at the time of the challenged conduct. The general First Amendment right of a prisoner to be free from punishment or discrimination on account of his religious faith may be said to be clear. *Cooper v. Pate*, 382 F.2d 518, 521 (7th Cir. 1967). Under *Procunier v. Navarette*, *supra*, however, it appears that the right

in question must have been established in a more particularized way to meet the *Wood* test.

In *Navarette* a state prisoner sought relief for an alleged violation of 42 U.S.C. § 1983 when prison officials interfered with his outgoing mail. The Supreme Court held that, at the time of the alleged interference no specific right protecting the mailing privileges of prisoners had been established. The Court so held even though a series of cases in the local United States district court had confirmed such rights as that of inmates to receive newspapers and magazines and that of parolees to make speeches to public gatherings without obtaining advance permission. 434 U.S. at 564 n. 11, 98 S.Ct. 855. Indeed, one case had recognized that pretrial detainees have a First Amendment right in their correspondence. *Id.* None of these cases, however, had dealt specifically with the rights of convicted prisoners in their mail, and thus the Court found that the particular constitutional right at issue had not yet been declared.

Following the rationale of *Navarette*, it would appear that the specific right at issue here—that of a prisoner to refuse an order requiring him to handle foodstuffs forbidden by his religion—was not "clearly established" in October 1972. While *Cooper* noted the existence of a prisoner's right to be free from punishment on account of his religious beliefs, it also noted that a prisoner is subject to various curtailments of his freedom to exercise his beliefs. 482 F.2d at 521. Indeed, courts in other circuits had at the time declared that the practice of one's religious faith does not permit violation of prison discipline. *Evans v. Ciccone*, 377 F.2d 4 (8th Cir. 1967); *Sostre*

v. McGinnis, 334 F.2d 906, 908 (2d Cir.), *cert. denied*, 379 U.S. 892, 85 S.Ct. 168, 13 L.Ed.2d 96 (1964). In *Evans* a federal prisoner of the Islamic faith had been disturbing others by religious discussion and was punished for direct disobedience of an order to return to bed. The court held that he had not suffered discrimination on account of his religion, noting that "[f]reedom of religion can never mean . . . freedom to flagrantly disregard reasonable rules of conduct in or out of prison." 377 F.2d at 6. We need not here comment on the correctness of these decisions or whether they would necessarily be followed today. It is sufficient that we note their existence at the time of the incident at issue, for, coupled with the absence of decisions which could be said to declare such a right, they support the proposition that no such right was "clearly established" at the time. "Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, [defendants] did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as in good faith.'" *Procunier v. Navarette*, 434 U.S. at 565, 98 S.Ct. at 861 (citation omitted). Thus, the *Wood* test is not met and official immunity is available to the defendants as a defense to Chapman's First Amendment claim for monetary damages.

III

That defendants are immune from monetary damages based on the First Amendment claim does not, of course, render moot Chapman's claims for injunctive and declaratory relief. Nor does the fact that Chapman is currently on parole moot these claims, as

the district court apparently reasoned. In *Chapman v. Kleindienst*, we noted that "[a]s long as Chapman remains at Marion, and as long as he may again be required to handle pork, or may again go before the Adjustment Committee, the possibility of the reoccurrence of these issues satisfies the 'actual controversy' requirement of the Declaratory Judgments Act, 28 U.S.C. § 2201, and the 'case or controversy' requirement of Article III." 507 F.2d at 1249-50 (footnote omitted). While it is true that Chapman is no longer physically at Marion, he will apparently remain on parole until 1988 and could be returned to prison should he violate the terms of his conditional release. Because there may yet be a continuing effect from the use of records maintained concerning the punishment he received,[2] we may not dismiss the matter as moot. *Morales v. Schmidt*, 489 F.2d 1335 (7th Cir. 1973); *Black v. Warden*, 467 F.2d 202 (10th Cir. 1972).

The instant case is distinguishable from *Preiser v. Newkirk*, 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975). In *Preiser* the Court ruled that a prisoner's request for declaratory and injunctive relief following an unconstitutional transfer had been mooted by the fact that the prisoner had been transferred back to his original prison. The Court stated that the mere possibility the prison authorities might use the record notations of the transfer against the prisoner in the future was too speculative to merit review of the prisoner's requests that the transfer be declared unconstitutional and that an injunction

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[2] *E.g.*, if Chapman should be returned to prison, computation of good time allowance may be affected by past punishment. *See* 18 U.S.C. § 4161; *Black v. Warden*, 467 F.2d 202 (10th Cir. 1972).

issue ordering that all records of it be expunged and that no future transfer be made without a hearing. The Court relied on the fact that a notation had been made in his file by the prison authorities expressly stating that the transfer should have no bearing in any future determinations. It was thus able to say that it had before it more than a mere voluntary cessation of allegedly illegal conduct which left the defendant free to return to his old ways. *Id.* at 402, 95 S.Ct. 2330.

Unlike the Court in *Preiser*, we have before us no indication of any kind that the record of Chapman's punishment will not be used against him in the future. Thus, the issue of an injunction against such future use is not moot. On remand, which we order *infra*, the district court should address itself to the question of expurgation of the record of his punishment, which will entail an inquiry into whether Chapman was wrongfully placed in segregation in violation of his First Amendment rights. *See Chapman v. Kleindienst*, 507 F.2d at 1248 n. 2. *See also Ware v. Heyne*, 575 F.2d 593 (7th Cir. 1978).

With regard to Chapman's request for declaratory and injunctive relief against future infringements of his religious freedom, following the rationale of *Preiser*, that request has been mooted by the adoption of a new Bureau of Prisons policy prohibiting the assignment of prisoners to details where they must work with pork if it is against their religious beliefs. *See* Plaintiff's Exhibit No. 4. Therefore, no further action on these claims need be taken on remand.

IV

Chapman also appeals the district court's denial of his claim for relief based on the fact that he was

not provided food substitutes for the pork items from which he abstained during confinement in segregation. The district court based its denial of relief on the doctrine of *Rizzo v. Goode*, 423 U.S. 362 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The Court in that case stated that 42 U.S.C. § 1983 "impose[s] liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and the laws." *Id.* at 370-71, 96 S.Ct. at 604. It therefore refused to hold liable supervisory personnel who played no affirmative part in the deprivation of a right. The district court in the instant case found that the evidence showed that at best only one defendant, Pickett, had any responsibility for the diet of prisoners in segregation, and that Pickett's responsibility was merely supervisory. Since nothing has been shown to contradict these findings, we affirm the district court's application of the *Rizzo* doctrine.[3]

V

Finally, Chapman appeals the district court's rulings that his confinement in segregation did not constitute cruel and unusual punishment violative of the

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[3] The district court also found that a 1970 Federal Bureau of Prisons policy statement provided that a committed offender may abstain from eating those food items which are prohibited by his religion and that he may receive added portions from the main line of non-rationed items to make up any nutritional deficiency. Absent any affirmative act on the part of defendants to circumvent this policy, however, its mere existence does not take the case out of the *Rizzo* doctrine. *See Rizzo v. Goode*, 423 U.S. at 275-76, 96 S.Ct. 598.

Eighth Amendment until May 5, 1973, and that even after that date Chapman failed to demonstrate that he was entitled to damages for his unconstitutional punishment. While we agree that an Eighth Amendment violation has occurred, we reverse as to the date of its occurrence and Chapman's entitlement to damages.

In *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973), we recognized that "punishment which is disproportionate to the offense committed constitutes cruel and unusual punishment, whether imposed without or within prison walls." *Id.* at 635-36. We further recognized that disproportionality is a question both of degree and of fact, and we gave some examples to illustrate our thinking and to serve as benchmarks in future cases. We contrasted the case of an inmate who refuses an order to shave his beard with that of the mastermind of a large-scale escape attempt, noting that the former "does not ordinarily deserve solitary confinement." *Id.* at 636. Chapman's alleged "offense," if such it was, is clearly closer to the former than the latter example. It is questionable whether indeterminate segregation was at all appropriate for the type of offense charged. At the very least, the period of nearly *seven months* from October 11, 1972 to May 5, 1973 was manifestly disproportionate to the offense of failing to perform work as instructed, especially when viewed in light of the facts that the refusal was based on religious grounds, the pork was somehow removed by another through Chapman's efforts, he finished the task of cleaning the cart himself, and due to his attitude he was allowed to return to his work for the remainder of the day. It is also to be noted that at least as of March 9,

1973, the Bureau of Prisons had adopted a policy which prohibited assignment to kitchen clean-up detail of those prisoners who refused to handle pork on religious grounds; yet Chapman was not released from punishment for this "offense" until *over four months later*. The district court should consider these facts on remand in determining the extent of the Eighth Amendment violation.[4]

The district court also erred in its denial of Chapman's claim for monetary damages based on the Eighth Amendment violation. The court found that plaintiff failed to show that actual damages were suffered, although it noted the conditions under which Chapman lived while confined in segregation, including lack of exercise, lack of society with other inmates or family and friends, and lack of work or

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[4] Defendants assert that Chapman's remarks concerning the supervisor at Leavenworth properly may have been considered in determining the length of Chapman's confinement, even though defendants admit the Leavenworth investigation of the oven incident did not raise Chapman as a suspect. If the prison authorities had wished to charge Chapman with threatening another with bodily harm, they could have done so; it was, in fact, a separately listed "Prohibited Act" under Prison Code § 004. No such charge was ever made, nor was any hearing regarding it ever held. Defendant Pickett did not even reply to Chapman's request for a formal explanation of his confinement. The mere fact that the remark was listed in the violation report and the investigator's report is not sufficient. *Hayes v. Walker*, 555 F.2d 625, 633 (7th Cir. 1975), *cert. denied*, 434 U.S. 959, 98 S.Ct. 491, 54 L.Ed.2d 320 (1977). Not having been communicated to Chapman as a ground for the decision, it may not properly be relied on as justifying the punishment of indeterminate segregation. *See United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914, 96 S.Ct. 1511, 47 L.Ed.2d 764 (1976).

vocational training. We recently held in *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), that such a list of conditions is sufficient to support a claim for damages, and we find that case to be controlling here. As we stated in *Buise*, "[a]dmittedly, it is difficult to move from these [conditions] to a compensatory dollar amount, but such difficulty cannot preclude an award of more than nominal damages. . . . Other courts have translated a series of conditions into a realistic dollar figure, and the district court should do so on remand." *Id.* at 233.

VI

One additional matter requires our attention. Although we have held that defendants enjoy a qualified official immunity from monetary damages regarding Chapman's First Amendment claim, this does not extend to the Eighth Amendment violation. Indeed, it is arguable that the very nature of an Eighth Amendment violation would preclude the availability of a qualified official immunity defense. We need not reach that question, however, for, regardless of its theoretical availability, the defense may not be used here because defendants have failed to qualify under the *Wood* standards.

There can be no serious contention with the fact that the right to be free from disproportionate punishment has long been "clearly established." At least as early as 1910, the Supreme Court declared it to be "a precept of justice" that punishment for crime must be proportioned to the offense, lest it be found to be cruel and unusual. *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). This being so, the question becomes one of whether defendants "knew or should have known" that their

confinement of Chapman to segregation was or became grossly disproportionate to the offense with which he had been charged. But this question almost answers itself, for if a point in time can be determined when the punishment became so seriously disproportionate as to violate the Eighth Amendment, at that same point defendants "should have known" that the punishment was grossly excessive.[5] Thus, under the *Wood* standards, the defense of qualified official immunity is not available for damages arising out of Chapman's Eighth Amendment claim.

The judgment of the district court is affirmed in part and reversed in part; the cause is remanded for further proceedings consistent with this opinion.

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[5] The determination of that point in time is left to the district court on remand.

APPENDIX G

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 74-1218

EDWARD JOSEPH X. CHAPMAN,
PLAINTIFF-APPELLANT

v.

RICHARD KLEINDIENST ET AL.,
DEFENDANTS-APPELLEES

Argued Nov. 20, 1974

Decided Dec. 16, 1974

PER CURIAM.

Edward Joseph X. Chapman, a prisoner at Marion Federal Penitentiary, brought this *pro se* civil rights action against various federal prison officials [1] as a result of his extended confinement in punitive segregation at the institution. Chapman alleged that his placement in segregation for his refusal to handle

[1] Attorney General Richard G. Kleindienst; Norman A. Carlson, Director of the Federal Bureau of Prisons; George W. Pickett, Charles Fenton, and Captain Earl Buzzard, Marion officials; and Frederick Siber, Director of Chaplaincy Services, Federal Bureau of Prisons.

pork, motivated by his observance of what he contends is a basic tenet of his Black Muslim religion, during kitchen clean-up duties violated his First Amendment free exercise rights. He further claimed that he was denied procedural due process at the hearing that preceded his segregation and that the resulting segregation for nine months constituted cruel and unusual punishment. Chapman sought, in substance, a mandatory injunction ordering his return to the general prison population, an injunction restraining defendants from interfering with his religious freedom, actual and punitive damages, a declaratory judgment, and a writ of mandamus.[2]

Chapman's request for the appointment of counsel was denied by District Judge Foreman at the commencement of the one-day hearing held on October 9, 1973. Chapman called two witnesses, James Tippy, a Marion caseworker, and James Culley, who had served on the Adjustment Committee that ordered Chapman placed in segregation. At the close of Culley's testimony, Judge Foreman recessed the case and indicated that he would hear no more testimony. When Chapman protested that he wished to call another witness, Keith X. Ferres, to testify as to the tenents of the Muslim faith, Judge Foreman indi-

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[2] In addition, if it is found that Chapman was wrongfully placed in segregation, expurgation of the record of this punishment would seem appropriate to protect Chapman from future prejudice in obtaining parole, work assignments, and the transfer to a prison nearer his home. Chapman included in his complaint a general prayer for all appropriate relief. It is axiomatic that *pro se* prison complaints will be held to a less stringent standard than pleadings drafted by lawyers. *See* Haines v. Kerner, 404 U.S. 519, 520-521, 92 S.Ct. 594, 30 L.Ed.2d 652; Bryant v. Harris, 465 F.2d 365, 366 (7th Cir. 1972).

cated that Chapman could submit an affidavit instead, but that he, Judge Foreman, would determine whether additional testimony would be necessary.

On December 17, 1973, the district court entered judgment for the defendants, holding Chapman's claim for a mandatory injunction moot because he had been released from segregation on July 23, 1973. The court further concluded that Chapman had failed to prove any of the allegations of his complaint.

On this appeal, Chapman, who is now represented by counsel, argues that the district court erred in the following respects: 1) even though Chapman had been released from segregation, his claim for injunctive relief was not thereby mooted; 2) the district judge abused his discretion in not appointing trial counsel for Chapman; 3) the district court improperly terminated the case prior to the close of Chapman's presentation; 4) Chapman had in fact made out a prima facie case on each of the three alleged constitutional violations; and 5) several evidentiary rulings were erroneous. For the following reasons, we reverse and remand for a new trial.

I.

Insofar as the ruling that Chapman's release from segregation rendered his claim for a mandatory injunction ordering release moot is concerned, the trial judge was clearly correct. We do not read his order as holding that Chapman's release mooted his claims for monetary, declaratory, or prohibitory injunctive relief.[3] The release could not have had those effects; the recovery of damages for the alleged violations of

[3] The defendants suggest opaquely that Judge Foreman's mootness determination applied to the entire request for injunctive relief. Appellees' Brief at 5.

his constitutional rights does not turn on his continued presence in segregation.[4] Nor would his release render moot his request for a declaratory judgment that the acts of these prison officials were unconstitutional, for an injunction prohibiting further such actions, and for further appropriate relief, including the expurgation of his prison record. As long as Chapman remains at Marion, and as long as he may again be required to handle pork, or may again go before the Adjustment Committee, the possibility of the reoccurrence of these issues satisfies the "actual controversy" requirement of the Declaratory Judgments Act, 28 U.S.C. § 2201, and the "case or controversy" requirement of Article III.[5]

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[4] Defendants have argued here that Chapman may not maintain his damage action because of the doctrine of "official immunity." Judge Foreman did not rule on this defense below; it is unclear that it was presented to him, although the defendants did cryptically state in their answer that "Inmates of federal penitentiaries are not entitled to monetary damages for violation of their First Amendment rights, if such a violation occurred." In any event, the defense of official immunity, because it is not an absolute bar to damage recoveries, requires a full hearing and concomitant findings of fact by the trial judge. On remand, which we order *infra*, the defendants may argue that the circumstances in which damages may be recovered against federal officials for official acts first enunciated in Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434, and further developed in our decisions in Scherer v. Brennan, 379 F.2d 609 (7th Cir. 1967), cert. denied, 389 U.S. 1021, 88 S.Ct. 592, 19 L.Ed.2d 666; Skolnick v. Campbell, 398 F.2d 23 (7th Cir. 1968); and Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968), cert. denied, 393 U.S. 1084, 89 S.Ct. 868, 21 L.Ed.2d 777, have not been demonstrated by Chapman.

[5] The federal courts have concluded that prisoner complaints were not moot under similar circumstances in West v. Cun-

In addition, Chapman's complaint was drafted as a class action, brought on behalf of all Black Muslims at Marion, some of whom, he alleges, are in segregation as a result of the same First Amendment violations of which Chapman complains. Judge Foreman failed to conduct the investigation and make the findings of the appropriateness of the class action required by Fed.R.Civ.P. 23(c). If Chapman's contentions of a uniform institutional policy applying to all Black Muslims are correct, this is another compelling reason for finding that the case is not moot and deciding these questions at this time. *See* Workman v. Mitchell, 502 F.2d 1201, 1207-1208 (9th Cir. 1974).

II.

Chapman next argues that the trial judge abused his discretion in not granting Chapman's motion for appointment of counsel, once it became clear that he had a reasonable chance of succeeding in this action. Without determining whether Judge Foreman abused his discretion in this case, we have concluded that on remand it would be appropriate for Chapman to have the assistance of counsel. A staff attorney of the Northwestern Legal Assistance Clinic, which represented Chapman before us, has indicated both the willingness and the financial capacity to continue this representation. Since she has already demonstrated her competence and familiarity with the record, we

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ningham, 456 F.2d 1264, 1265-1266 (4th Cir. 1972); Barnett v. Rodgers, 133 U.S.App.D.C. 296, 410 F.2d 995, 997 n. 1 (969); Jackson v. Bishop, 404 F.2d 571, 575-576 n. 5 (8th Cir. 1968) (Blackmun, J.); and Pierce v. LaVallee, 293 F.2d 233, 234 (2d Cir. 1961).

direct the trial judge to make the necessary request pursuant to 28 U.S.C. § 1915(d).[6]

III.

After Chapman had completed his examination of his first two witnesses, the trial judge stated:

> "The Court will continue this matter generally at this time. I'll take the matter under advisement with regard to the evidence that is presented and with regard to the other matters that are to be submitted to me and I'll make a ruling as to whether or not, in my opinion, additional evidence is needed. I do not have any more time available for this matter at this time." Tr. 71.

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[6] We have previously held that the decision whether to request counsel to represent an indigent in a civil case, as authorized by 28 U.S.C. § 1915(d), "rests in the sound discretion of district courts unless denial would result in fundamental unfairness impinging on due process rights." LaClair v. United States, 374 F.2d 486, 489 (7th Cir. 1967). *See also* Ehrlich v. Van Epps, 428 F.2d 363, 364 (7th Cir. 1970). Chapman would have us adopt the standard set forth in Dreyer v. Jalet, 349 F.Supp. 452, 486 (S.D.Tex. 1972), aff'd mem., 479 F.2d 1044 (5th Cir. 1973):

> "[I]f a civil action brought by an indigent acting pro se, including prison inmates, has merit requiring an evidentiary hearing, then counsel should be appointed to properly present the claim."

See Peterson v. Nadler, 452 F.2d 754, 757-758 (8th Cir. 1971); Chubbs v. City of New York, 324 F.Supp. 1183, 1191 (E.D. N.Y. 1971); *cf.* United States v. Simpson, 141 U.S.App.D.C. 8, 436 F.2d 162, 167-170 (1970). These cases discuss the highly complex institutional and financial considerations posed in a request for counsel for the indigent civil litigant. We need not, however, decide this important question in this case.

Chapman was permitted to submit the affidavit of Keith X. Ferres, his expert on the Black Muslim religion, but was never subsequently allowed to call any more witnesses.

Termination of the proceedings in this manner was improper since Chapman had not finished presenting his case. Judge Foreman's ultimate ruling that Chapman had not proved the allegations of his complaint was not consistent with the implicit understanding that, should he decide additional evidence was necessary, he would permit Chapman to continue with the presentation of his case.

The defendants make much of the fact that Chapman stated that he had only one more witness, Keith X. Ferres, that Ferres was to testify only as to the tenets of the Muslim faith, and that there was no dispute over this issue. Judge Foreman decided to terminate the proceedings, however, *before* Chapman made this statement. *See* Tr. at 71. In truth, Chapman may have desired to call several additional witnesses, including himself, to the stand, but concluded that, in light of the judge's statement, he could hope that Judge Foreman would hear at least one more witness.

In addition, Chapman indicated that he might wish to call other witnesses for "rebuttal" testimony. Tr. at 74. While an attorney would refer to testimony as "rebuttal" only if it were to be presented after the defendants' case, Chapman may have meant simply additional witnesses. Judge Foreman so interpreted this reference; he stated:

> "If you desire to submit to the Court an affidavit of the other witnesses or witness—Mr. Ferres, that was here today, you may do so." Tr. at 74.

Thus, we cannot be certain that, but for Judge Foreman's premature termination of Chapman's presentation, the plaintiff would not have introduced the evidence that Judge Foreman concluded was lacking to prove the allegations of the complaint.[7]

While we sympathize with the trial judge's desire to have this case tried speedily, since we also are conscious of the number of prisoner cases on his docket, nevertheless the procedure used in this case is unacceptable. The fact that the trial judge had not scheduled additional time for this matter is plainly not a sufficient justification for aborting the trial before the plaintiff had completed his case.

IV.

Chapman contends that even on this truncated record Judge Foreman erred in concluding that he had not proved the allegations of his complaint.

With respect to Chapman's claim that he was punished for his observance of a basic tenet of his Black Muslim faith, we agree that he presented substantial evidence of interference with First Amendment rights and that judgment should not have been entered prior to hearing the defendant's evidence.

The defendants, in their brief, acknowledge that Chapman introduced proof that "(1) his religion forbids touching pork; (2) he was called upon to handle pork; (3) he was placed in segregation for refus-

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[7] Our ruling herein does not in any way interfere with the sound discretion of a trial judge to limit the number of witnesses that may appear to present essentially cumulative evidence. *See* Loux v. United States, 389 F.2d 911, 917 (9th Cir. 1968), cert. denied, 393 U.S. 867, 89 S.Ct. 151, 21 L.Ed.2d 135. Such was clearly not the basis of Judge Foreman's actions.

ing to obey an order by a supervisor, and that order was to handle pork. . . ." Appellees' Brief at 19.[8] Having established this interference with his First Amendment right, and having tendered additional evidence by an expert in the Muslim religion, Chapman was entitled to have the defendants come forth with their explanation of the reasons for the requirement that he handle pork. It was error for Judge Foreman to enter judgment for defendants on this issue. *See* Walker v. Blackwell, 411 F.2d 23, 25 (5th Cir. 1969); Barnett v. Rodgers, 133 U.S.App.D.C. 296, 410 F.2d 995, 1000 (1969); Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967).

We do not agree with Chapman, however, that Judge Foreman erred in granting judgment for the defendants on his procedural due process claim. Chapman contends that he was not afforded the procedural protections we described in United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied, Gutierrez v. Department of Public Safety, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102. Although his segregation hearing was held on Octo-

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[8] There is some evidence in the record that Chapman's segregation may have resulted in part from a threat made to the prison officer who ordered him to handle pork. Chapman admits saying that " 'Allah (God) might come to his defense and blow (Mr. Brown) him through an oven' as he allegedly did a previous prison oppressor of plaintiff." Complaint Paragraph 16(d). The Incident Report filed by Brown, however, stated the charge as "Failing to perform work as instructed by a supervisor," a violation of Code No. 303. Judge Foreman, in entering judgment for defendants, made no finding that the threat was the real reason for the segregation, instead of the refusal to handle pork. In its present incomplete posture, the record strongly indicates that Chapman was punished at least in part for his refusal to clean off the food carts.

ber 11, 1972, prior to our decision in *Miller*, he argues that we should apply that decision retroactively. In both Adams v. Carlson, 488 F.2d 619, 624-629 (7th Cir. 1973), and Thomas v. Pate, 493 F.2d 151, 161 n. 6 (7th Cir. 1974), we did so apply the *Miller* standards. The Supreme Court, however, granted *certiorari* in *Thomas*, vacated the judgment, and remanded the case for a reconsideration of the retroactivity issue in light of its decision in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *see* Cannon v. Thomas, —— U.S. ——, 95 S.Ct. 288, 42 L.Ed.2d 39 (1974). In *Wolff*, the Supreme Court stated that due process requirements in prison disciplinary proceedings are not to be applied retroactively. 94 S.Ct. at 2983. Thus, we may not apply the *Miller* standards in Chapman's case.

Instead, the procedures used in Chapman's segregation hearing must be judged against the due process standards in force at that time, the standards set forth in Adams v. Pate, 445 F.2d 105 (7th Cir. 1971). In *Adams* we stated that procedural due process was complied with when "the prisoner is confronted with the accusation against him and afforded a reasonable opportunity to deny the accusation or explain his actions." 445 F.2d at 108. Chapman's segregation was ordered only after compliance with these procedures. Thus, Chapman's claim for damages and for the expurgation of his records on this basis was properly denied. As there is no evidence that Marion officials are not complying with *Miller* at this time, the entry of a prohibitory injunction would have been improper.

Chapman finally contends the Judge Foreman erred in entering judgment for the defendants on Chapman's claim that his nine-month segregation was in violation of the Eighth Amendment prohibition of

cruel and unusual punishment. The essence of his claim is that a nine-month segregation period was disproportionate to the offense he allegedly committed, even assuming that prison officials could properly punish his refusal to handle pork.

In Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973), we recognized that "punishment which is disproportionate to the offense committed constitutes cruel and unusual punishment . . . ." 488 F.2d at 635-636. *See also* Haines v. Kerner, 492 F.2d 937, 942 (7th Cir. 1974). But, we noted that such a determination in the individual case must turn of necessity on an assessment of all the facts and circumstances surrounding the segregation decision, including such matters as the disciplinary offense involved, the prisoner's disciplinary record, and the offense for which the prisoner was originally sentenced.

It is precisely these facts that are missing from the record of this case. We do not know whether the threat Chapman admits making influenced the segregation length. We know nothing of any prior disciplinary problems or of any of the myriad factors that may have been and could properly be considered in setting the segregation term. The trial judge made no findings of fact and, as noted in Part III, *supra*, Chapman was prevented from completely presenting his case. For these reasons, although we express no opinion on the merits of the Eighth Amendment contention, Chapman is not foreclosed from pursuing this claim on remand. Of course, if Chapman should be successful in demonstrating that the sole reason for his segregation was his refusal to obey an order that violated his First Amendment rights, there would be no occasion to reach the Eighth Amendment

claim. For in that event the punishment would be entirely impermissible and no question of disproportionately would remain.

V.

In summary, we hold that Judge Foreman erred in truncating Chapman's presentation of his case, and that the facts in the record made out a prima facie case of a First Amendment violation. On remand, Chapman may pursue both his religious freedom violation and his cruel and unusual punishment claims.[9]

We note that, although Chapman's complaint contained what must be construed as a demand for a jury trial on the legal issues presented,[10] Judge Foreman conducted the October 9, 1973, hearing without a jury. While we agree that burying the jury demand in the complaint is not the best practice,[11] the court and its staff have a special responsibility to scrutinize carefully *pro se* complaints for just such infirmities. If Judge Foreman was aware of the jury demand but decided to hear the case himself first because of the prayer for injunctive in addition to damage relief, he clearly erred. The Supreme Court decisions in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-511, 79 S.Ct. 948, 3 L.Ed.2d 988, and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-473, 82 S.Ct. 894, 8 L.Ed.2d 44, require the presentation of the legal claims to the jury prior to any factual

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[9] Because of our disposition of his other contentions, it is unnecessary for us to consider Chapman's allegations concerning the trial judge's evidentiary rulings.

[10] *See* Complaint Paragraph 34(b)(7).

[11] *See* 5 J. Moore, Federal Practice ¶ 38.40, at 328.1-328.2 (2d ed. 1974).

resolution by the trial judge on the equitable claims. The fact that Chapman also sought a declaratory judgment does not affect this requirement.[12]

It is more likely, however, that Judge Foreman was simply unaware of the jury demand; Chapman raised no objection when the hearing was held without a jury. Normally, the failure to object under such circumstances would constitute a waiver of the right to a jury trial. *See* National Family Insurance Company v. Exchange National Bank of Chicago, 474 F.2d 237, 241 (7th Cir. 1973), cert. denied, 414 U.S. 825, 94 S.Ct. 129, 38 L.Ed.2d 59; Smith v. Cushman Motor Works, 178 F.2d 953, 954 (8th Cir. 1950). Here, however, Chapman, who was not represented by counsel, may not have been aware of his right to object to a hearing to the court. Thus, on remand, Chapman should be allowed a jury trial unless one is formally waived pursuant to Fed.R.Civ.P. 39(a).

The judgment is accordingly vacated and the case is remanded for further proceedings.

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[12] Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504-505, 79 S.Ct. 948, 3 L.Ed.2d 988.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS—
SPRINGFIELD DIVISION

No. 84-3001

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF

v.

GEORGE W. PICKETT,
Warden, U.S. Penitentiary, Marion;
RICHARD J. KLEINDIENST,
Attorney General of the United States;
NORMAN A. CARLSON,
Director, Bureau of Prisons;
Lt. J. CULLEY,
Control Program Manager, Marion Penitentiary;
FREDERICK SIBER,
Director of Chaplain Services,
Bureau of Prisons, DEFENDANTS

[Filed Sep. 26, 1984]

ORDER

After a long and tortured history, this Court believes that finally it can be concluded. Originally filed in April, 1973, the Plaintiff, Edward Joseph X. Chap-

man, alleged that federal prison officials violated his first, eighth, and fourteenth amendment rights for placing him in prison segregation for refusing to work due to religious reasons. Already this case has spawned a total of eight separate trial and appellate court decisions. *Chapman* v. *Kleindienst*, No. 73-92-e slip op. (E.D. Ill. Dec. 17, 1973) (Foreman, J.), *vacated by Chapman* v. *Kleindienst*, 507 F.2d 1246 (7th Cir. 1974); *on remand, Chapman* v. *Pickett*, No. 75-2-041 slip op. (E.D. Ill. April 4, 1977) (Wise, C. J.), *aff'd. in part and rev'd in part by Chapman* v. *Pickett*, 586 F.2d 22 (7th Cir. 1978); *on remand, Chapman* v. *Pickett*, 491 F. Supp. 967 (C.D. Ill. 1980) (Baker, J.); *rev'd. by Chapman* v. *Pickett*, No. 80-1640, slip op. (7th Cir. Dec. 12, 1980); *Chapman* v. *Pickett*, No. 75-C-2041, slip op. (C.D. Ill. Apr. 20, 1981) (Morgan, J.); *rev'd. by Chapman* v. *Pickett*, No. 81-1809, slip op. (7th Cir. Jan. 4, 1982). In an effort to end this case, this Court denied the Plaintiff's motion for a summary judgment and heard all testimony on the sole remaining question in this case—the date when the Defendants began violating the Plaintiff's eighth amendment rights and the amount of damages the Plaintiff suffered for that violation. In addition to hearing live testimony on the question of damages, this Court has also reviewed the transcripts and documentary evidence produced by the other hearings in this case. Upon this factual record, and the arguments of fact and law made by counsel for the respective parties, this Court makes the following findings of fact [1] and conclusions of law on damages.

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[1] This Court will not delve into all the facts which gave rise to the Defendants' liability, focusing only on the facts relevant

In 1972, the Plaintiff, Edward Joseph X. Chapman, was incarcerated at Marion Federal Penitentiary. On October 9, 1972, while on a kitchen work detail, he refused to clean some food trays which contained pork. Mr. Chapman refused because the tenets of his Islamic faith forbid him to handle pork in any fashion. Mr. Chapman informed his supervisor, Defendant J. E. Brown, of his inability to perform the work assigned because of his religious beliefs. Despite the fact that the refusal to perform the assigned work was based on a sincerely held religious belief, Mr. Brown filed an incident report charging Chapman with a violation of prison coded 303, failing to perform work as instructed by a supervisor. The disciplinary ticket stated that Mr. Chapman's religious beliefs formed the basis for his refusal to work. Although Mr. Chapman refused to do the work assigned, he did obtain the assistance of another inmate who performed the necessary cleaning. Mr. Chapman continued to work in the kitchen detail without incident for the next two days.

On October 11, 1972, Defendants Jack Culley, E. M. Cage, and Earl Buzzard, members of the Adjustment Committee for Marion at that time, met to act on Defendant Brown's disciplinary report. Mr. Chapman stated at the hearing that he had refused the order because it was prohibited by the tenets of his religion. Apparently unmoved by Mr. Chapman's religious grounds for his refusal to work, the adjustment committee sentenced Mr. Chapman to confinement in the prison's segregation block for an in-

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to the narrow questions before it. For a more exhaustive and detailed account of the incidents which gave rise to the lawsuit, *see Chapman II*, 586 F.2d at 24-25 (7th Cir. 1978).

determinate term. Mr. Chapman remained in segregation until his release on July 25, 1973, a period of 289 days.

The United States Court of Appeals for the Seventh Circuit determined in *Chapman II* that confinement and segregation for over seven months constituted disproportionate punishment to the Plaintiff's refusal to work, in violation of the Plaintiff's eighth amendment rights. 586 F.2d at 28. As stated previously, this Court must now determine when Mr. Chapman's confinement in segregation became disproportionate and the damages resulting from Mr. Chapman's confinement in segregation from the date his punishment became disproportionate. Despite this apparently clear mandate from the Seventh Circuit, the Defendants have argued that Mr. Chapman should not receive any damages for his extended confinement in segregation. The Defendants contend that the adjustment committee placed Mr. Chapman in segregation because of an alleged threat he made on Officer Brown's life when the latter wrote a disciplinary report for the Plaintiff's refusal to work. Defendants argue that confinement in segregation for 289 days does not constitute disproportionate punishment for a threat on a guard's life. Therefore, according to the Defendants, the decision of the United States Supreme Court in *Carey* v. *Piphus*, 435 U.S. 247 (1978), limits this Court to an award of only nominal damages. The Plaintiff has responded by arguing that the law of this case as stated by the Seventh Circuit in *Chapman II*, 586 F.2d at 28 n. 4, precludes consideration of the alleged threat made against Officer Brown. The Plaintiff further argues that the *Carey* decision does not support the Defendants' argument for an award of nominal dam-

ages. *See* Section I, Plaintiff's Reply Memorandum in Support of a Request for Judgment for the Plaintiff (filed April 17, 1984). Plaintiff's reply memorandum quite adequately disposes of the arguments of the Defendants. For the record this Court adopts the arguments contained within Section I of the Plaintiff's Reply Memorandum, as any further exposition on the subject by this Court would constitute only a duplication of effort.

A determination of when Mr. Chapman's punishment became disproportionate essentially requires this Court to sit as the adjustment committee hearing the refusal to work charges. This Court will therefore consider only those facts which were properly before the adjustment committee when it initially sentenced Mr. Chapman to an indeterminate term in segregation. According to the incident report, the adjustment committee was fully aware that Mr. Chapman's refusal to work was based on a sincerely held religious belief. Def. Ex. 1, Record (1976). Both Defendant Culley and Cage have testified that the sole reason Plaintiff was placed in segregation was his refusal to work. Record (1976) at 137 and 167-168. According to the investigation of the incident, Mr. Chapman displayed a good attitude and stated that his refusal to work was solely based on his religious beliefs against handling pork. The incident report further states that Chapman, through his own efforts, obtained the assistance of another prisoner and completed his work assignment. Finally, Mr. Chapman continued to work in the kitchen, without incident, for two full days following his initial refusal to handle pork. During these two days he worked alongside Officer Brown, the individ-

ual who Mr. Chapman allegedly threatened with grievous bodily harm.

Both sides have tendered expert testimony on the amount of punishment Mr. Chapman should have received based on his refusal to work for religious reasons. Professor Joseph Cannon, the Plaintiff's expert witness, testified that placing Mr. Chapman in segregation for any length of time on the facts outlined above constituted improper punishment. Record (1984) at 24. The Defendants' expert witness, Charles E. Fenton, came to an almost identical conclusion. According to Mr. Fenton, an inmate charged with refusal to work under the facts outlined above would receive from three days to a week in segregation. Record (1984) at 171. This Court believes that Mr. Fenton's testimony is especially credible in light of the fact that he was employed as an assistant warden at Marion when Mr. Chapman was incarcerated.

In light of the facts outlined above, and the expert testimony tendered by both the Plaintiff and the Defendants, this Court holds that the Plaintiff's internment in segregation became disproportionate after seven days. This Court must show some deference to the needs of the prison environment. *See Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979). Allowing a prisoner's refusal to work to go unpunished could raise serious disciplinary problems, as this Court was made aware by Mr. Fenton's testimony. After one week, however, even Mr. Fenton agreed that such punishment becomes disproportionate to the charge against the Plaintiff. Mr. Chapman refused to do the work assigned purely because of a religious reason. In this case, the Honorable Harold A. Baker has already held that such refusal was a proper exercise of Mr. Chapman's first amendment rights. *See* 491 F. Supp. at

970-972. Furthermore, the facts of this case show that there was no disruption in the kitchen as a result of the Plaintiff's refusal to work. On the day of the refusal which resulted in the charge, the Plaintiff procurred another prisoner to do the work which Mr. Chapman refused to perform. For two days after the charge was made, the Plaintiff worked in the kitchen without incident, and apparently effectively fulfilled all his duties. In light of these facts, this Court believes that seven days in segregation was sufficient punishment for the Plaintiff's refusal to work based on religious reasons. This Court must award damages for 282 of the 289 days Mr. Chapman spent in segregation.

In assessing damages, this Court must determine the difference in living conditions which Mr. Chapman had while in segregation as opposed to those he would have enjoyed had he been a member of the general prison population. *Chapman II*, 584 F.2d at 28, *citing Buise* v. *Hudkins*, 584 F.2d 223, 233 (7th Cir. 1978). Despite the Defendants' contentions to the contrary, the facts show that confinement in segregation creates significant and much more restrictive conditions of confinement. The most obvious distinction is the complete denial of social contact with other inmates. Mr. Chapman testified that throughout his confinement in segregation he had no direct contact with any of the other inmates. This inability to socialize had an even more significant effect on Mr. Chapman. The Plaintiff's confinement in segregation denied him the opportunity to attend any religious services. Furthermore, the evidence shows that only once was Mr. Chapman visited by a minister of his faith.

The Plaintiff suffered other deprivations relating to his segregation. According to the uncontroverted

testimony of Mr. Chapman, prison authorities confiscated all his religious materials when he entered segregation. While in segregation, the prisoner remained within his own cell. An inmate in segregation could only exercise a few times a week and at those times only for fifteen to thirty minute intervals. The Plaintiff was unable to shower or shave as frequently as the Plaintiff's religious beliefs demanded. Apparently, in the general prison population the Plaintiff was able to maintain such habits. The Plaintiff was unable to receive adequate nutrition because a significant portion of the meals he was served contained pork. If the Plaintiff had remained in general population, he could have substituted other items for the pork items. Finally, the Plaintiff was unable to receive any vocational training while in segregation. Although the Plaintiff was able to receive his high school equivalency, the denial of vocational training did constitute a difference between segregation and the general prison population.[2] Finally, the Plaintiff testified that his placement in segregation caused him emotional distress, and the developed nervous condition.

This Court has reviewed all the precedents cited by both Plaintiff and Defendants in support of their respective positions on the amount of damages the Plaintiff suffered. Although they offer some guidance to this Court, the wide disparity in the amounts granted by courts show that I have a fairly large amount of discretion to determine the proper amount

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[2] The Plaintiff's testimony and these findings are consistent with Judge Foreman's findings of fact on the conditions of confinement in the Control Unit at Marion in *Bono v. Saxbe*, 450 F. Supp. 934 (E.D. Ill. 1978).

of damages. In *Saxner* v. *Benson*, 727 F.2d 669 (7th Cir. 1984), the United States Court of Appeals for the Seventh Circuit upheld an award of $4,500 to two plaintiffs for thirty-five days spent in segregation in an Indiana correctional institution. As evidence in support of the damage award, the court noted that one of the prisoners was confined almost twenty-four days to the segregation cell without access to the prison yard or other exercise facilities, and that the prisoners lost various other privileges. Furthermore, the court approved the trial court's consideration of mental and emotional distress injuries attributable to the due process violations which placed the prisoners in segregation.

> The trial court found that "anguish and frustration which flowed from the patent unfairness of the hearings and the fear that such unfair treatment would continue in the future in their administrative review and appeals, at their parole hearings, and in their day to day existence in the segregation units unrelated to the issue of length (35 days) of time served in segregation" contributed to their actual injuries.

Id. at 672. In *Mary and Crystal* v. *Ramsden*, 635 F.2d 590 (7th Cir. 1980), the United States Court of Appeals for the Seventh Circuit upheld jury awards of $2,400 and $1,600 for twenty-nine and nineteen days, respectively, spent by the juvenile plaintiffs in isolation in a juvenile correctional center. The injuries suffered by the juvenile plaintiffs while in isolation were comparable to those suffered by Mr. Chapman at Marion. In *United States ex rel. Larkins* v. *Oswald*, 510 F.2d 583 (2d Cir. 1975), the United States Court of Appeals for the Second Cir-

cuit approved an award of $1,000 for twelve days spent in segregation under circumstances similar to those of Mr. Chapman. Finally, in *Riley* v. *Johnson*, 528 F. Supp. 333 (E.D. Mich. 1981), a federal district court awarded $25 per day solely for emotional distress caused by the insult to the inmate's dignity occasioned by the inmate's illegal confinement in segregation. In light of the precedent above, I shall therefore award the Plaintiff $7,000 for the time he was unconstitutionally incarcerated in segregation at Marion Penitentiary.

Next, this Court must determine which Defendants will be liable for the damages. First, this Court does not believe that Officer Brown is liable for any damages. The damages imposed here are for the sentence which the Plaintiff was required to serve disproportionate to the offense to which it was charged. The Plaintiff has made no showing that Officer Brown had any involvement in the sentence imposed on the Plaintiff. Officer Brown, by bringing the charge, was merely an actor in a sequence of events which ultimately caused the Plaintiff's eighth amendment rights to be violated.

This Court does find liable, however, Defendants Cully, Buzzard and Cage. All three of these individuals were on the original sentencing committee, and according to the testimony presented in the 1976 hearing, all apparently sat on a committee which reviewed Mr. Chapman's confinement to segregation. It was these three individuals who apparently had primary responsibility for determining who would remain in segregation and the amount of time a prisoner would remain.

This Court shall impose liability on Defendant Fry. Mr. Fry approved the original indeterminate

sentence. His approval of the indeterminate sentence gave rise to the constitutional violation. In light of the Defendants' expert's testimony that the Plaintiff's acts should have resulted in a maximum of three to seven days in segregation, this Court believes that Mr. Fry should be held liable for approving an indeterminate sentence.

George Pickett creates a peculiar problem. Normally, a plaintiff would be hardpressed in proving a warden liable for an administrative committee placing an inmate into segregation. In the trial before Judge Wise in 1976, however, the parties entered into a stipulation on behalf of Mr. Pickett. In that statement, Mr. Pickett stated that he had knowledge of the Plaintiff's placement in segregation on October 11, 1972, and that he had the authority to override the decisions of the officers at his prison. Furthermore, Mr. Pickett stated that he received a copy of the March 15, 1973, letter from Norman A. Carlson, the Director of the Federal of Prisons, to Congressman Charles Rangel. At the very least, this letter, which implied that Mr. Chapman felt that he was being punished for his religious beliefs, should have put Mr. Pickett on notice to investigate the situation. On these facts I shall therefore impose liability on Mr. Pickett.

The Plaintiff also has requested an award of punitive damages. This Court does not believe that the facts of this case warrant such an award. This Court believes that the Defendants sincerely thought that the Plaintiff's statement that Allah would punish Officer Brown was a threat. Despite the fact that they completely failed to investigate the alleged "threats," or ever allow Mr. Chapman a chance to be heard on the supposed "threat," I do believe that such

a belief precludes the existence of a malicious intent required for punitive damages.

This Court, therefore, awards the Plaintiff damages in the amount of $7,000 plus costs. The Clerk is hereby ordered to enter judgment accordingly.

Enter this 25 day of September, 1984.

/s/ J. Waldo Ackerman
J. WALDO ACKERMAN
Chief U.S. District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 75-C-2041

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF

v.

GEORGE PICKETT, ET AL., DEFENDANTS

[Filed Apr. 20, 1981]

MEMORANDUM AND ORDER ON DAMAGES

This case comes to this court on remand from the United States Court of Appeals for the Seventh Circuit. It was originally filed in 1973 as a *pro se* complaint seeking relief under 42 U.S.C. § 1983 for alleged violations of constitutional rights. Plaintiff was an inmate at the federal penitentiary in Marion, Illinois. He was placed in a segregation unit after he refused a supervisor's instructions to handle pork in the kitchen. Plaintiff is a practicing Muslim, and he claimed that any handling of pork would be contrary to Muslim teachings. Plaintiff remained in the segregation unit for approximately 10 months.

Prior to this consideration, this case has been heard by three different district judges, each of whom held

evidentiary hearings and rendered decisions based on specific findings of facts and conclusions of law. The Court of Appeals has reviewed each of those decisions, which have been affirmed in part and reversed and remanded in part. On the present remand, this court has reviewed the entire record, including transcripts, pleadings, briefs, and all of the court decisions, and finds that another evidentiary hearing is not appropriate. The prior findings that are relevant at this time may be summarized as follows:

1. There were no procedural due process violations in the hearing afforded Chapman before he was placed in segregation, *Chapman* v. *Kleindienst*, 507 F.2d 1246, 1252 (7th Cir. 1974) (*Chapman I*).

2. All of the defendants are entitled to official immunity against any money damages based on plaintiff's First Amendment claims, *Chapman* v. *Pickett*, 586 F.2d 22, 26 (7th Cir. 1978) (*Chapman II*).

3. Plaintiff is not entitled to relief on his claim that officials refused to substitute other foods for the pork in his diet, *Chapman II*, 586 F.2d at 27.

4. Plaintiff's assignment to segregation did not alter the physical conditions of his environment, *Chapman* v. *Pickett*, 491 F. Supp. 967, 970 (D.C., C.D. Ill. 1980) (*Chapman III*).

5. Plaintiff's First Amendment right to free exercise of religion was violated by his punishment for refusal to handle pork, *Chapman III*, 491 F. Supp. at 972.

6. The report of the incident and the disciplinary action taken against plaintiff is now to

> have been expunged from his record, and any future use of such record has been enjoined, *Chapman III*, 491 F. Supp. at 974.

The Court of Appeals in *Chapman IV* (December 12, 1980 unpublished order) found plaintiff's Eighth Amendment claims not affected by the decision in *Rummel* v. *Estelle*, 445 U.S. 263 (1980), and remanded the case to the district court "for determination on the only two issues that remain in this case: when the (Eighth Amendment) violation began and what the damage award should be."

In *Chapman I*, 507 F.2d at 1252, 1253, however, the court stated:

> "Of course, if Chapman should be successful in demonstrating that the sole reason for his segregation was his refusal to obey an order that violated his First Amendment rights, there would be no occasion to reach the Eighth Amendment claim. For in that event the punishment would be entirely impermissible and no question of disproportionality would remain."

Judge Baker found precisely that in *Chapman III*, 491 F. Supp., starting at p. 971. Therefore, it is clear that plaintiff has no cognizable Eighth Amendment claim before this court, and consequently is entitled to no damages on such a claim.

Now the question might be said to remain: Is plaintiff entitled to money damages for the First Amendment violations?

It is also clear that the Court of Appeals in *Chapman II* affirmed Judge Wise's finding of official immunity, on the part of all defendants, from money damages arising from the First Amendment violation

as found. Plaintiff has already been granted the injunctive relief he sought in connection with that claim. This court cannot escape the law of the case.

Accordingly, IT IS ORDERED that the case is DISMISSED, and that plaintiff recover no money damages therefrom.

/s/ Robert D. Morgan
ROBERT D. MORGAN
United States District Judge

Entered: April 20, 1981

APPENDIX J

UNITED STATES DISTRICT COURT
C. D. Illinois

No. 75-2-041

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF

v.

GEORGE PICKETT ET AL., DEFENDANTS

April 18, 1980

JUDGMENT

BAKER, District Judge.

This is a civil rights action arising under 42 U.S.C. § 1983 concerning the First and Eighth Amendment rights of a Black Muslim prisoner who was placed in segregation for some 9½ months following his refusal on religious grounds to handle pork during a kitchen clean-up detail.

The case is here on its second remand. *Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978) *(Chapman II); Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974) *(Chapman I)*.

FACTS

The facts of the case to this point are set forth in *Chapman II*:

> Edward Joseph X. Chapman was a prisoner in the federal penitentiary at Leavenworth, Kansas, when, on October 4, 1972, he was transferred to the Marion, Illinois, penitentiary. On October 9 Chapman was assigned to the kitchen detail, which assignment included transporting food carts and clearing food off of them. When Chapman discovered that the food trays in the carts contained pork, he went to his supervisor, defendant J. E. Brown, and informed him that because of the beliefs of his Black Muslim faith, he could not handle the pork on the trays. According to his testimony at trial, Brown then offered Chapman the use of either gloves or various kitchen utensils to enable him to complete the task. While Chapman at trial denied that he was offered these, he did acknowledge that, regardless of such an offer, he would still have refused to do the work, since even indirect touching was forbidden. Brown then advised Chapman that he would be forced to write a disciplinary report on Chapman if the task were not performed. Chapman responded by saying that the last man who had written a report on him concerning an incident of this nature had been "blown out of an oven" at Leavenworth just two months previously.
>
> After the incident Brown filed a report charging Chapman with violating Prison Code § 303, "Failing to perform work as instructed by a supervisor." His report also mentioned the Leavenworth remark. An investigative report, completed the day of the incident by another official

and sent to the prison's Adjustment Committee, stated that "Chapman had a very good attitude." It noted that "apparently through Chapman's efforts someone had removed the pork from the cart and Chapman had finished cleaning the cart."

On October 11 the Adjustment Committee, which included defendants Jack Culley, Earl Buzzard, and E. M. Cage, met to consider Brown's report. Chapman was present and, upon having the report read to him admitted the facts of the incident, again explaining that his refusal was the result of his Black Muslim beliefs. The Committee decided to punish Chapman by placing him in the segregation unit for an indeterminate term.

Chapman's status in segregated confinement was reviewed periodically. At least once during this confinement Chapman sought a formal explanation of his confinement from defendant George Pickett, warden at Marion, and requested immediate release. No reply from Pickett was received. During Chapman's confinement on March 15, 1973, Pickett received a copy of a letter dated March 9, 1973, from the Director of the Federal Bureau of Prisons, Norman A. Carlson, in which the Director stated to Congressman Charles Rangel that "[w]e have reexamined the situation and have communicated to the heads of our facilities instructions not to assign individuals to the details where they must work with pork if it is against the religious beliefs of those men." Chapman was not returned to the general prison population, however, until July 25, 1973.

586 F.2d at 24.

PROCEDURAL HISTORY

The procedural history of the case is somewhat lengthy. Chapman brought suit for injunctive and declaratory relief and for damages alleging (1) violation of his First Amendment right to free exercise of religion, (2) denial of procedural due process at the disciplinary hearing which preceded his segregation, and (3) cruel and unusual punishment in violation of the Eighth Amendment by assignment to segregation for over nine months. In the first trial, the district court, after hearing testimony from two witnesses, refused to hear further evidence. Thereafter, the court entered judgment for the defendants on the grounds that Chapman had failed to prove any of the allegations in his complaint and that his claim for a mandatory injunction was moot since he had already been released from segregation.

On appeal, the Court of Appeals affirmed the denial of a mandatory injunction ordering release but reversed the dismissal of the claims for damages and for declaratory and prohibitive injunctive relief as well as "further appropriate relief, including the expurgation of his prison record." 507 F.2d at 1249. The reviewing court further held (1) that the facts made out a *prima facie* case of a First Amendment violation, (2) that the trial court had erred in terminating testimony, (3) that the plaintiff had not been denied procedural due process. The appellate court made no rulings on the Eighth Amendment claim due to the inadequacy of the record. The case was remanded for a new trial.

At retrial, the district court never reached the merits of plaintiff's First Amendment claim. The court found that the defendants had a qualified official immunity from liability for damages under the

First Amendment and that the plaintiff's request for injunctive and declaratory relief was mooted by his release on parole and by the new policy adopted by the Federal Bureau of Prisons exempting Black Muslims from handling pork. The trial court also found that the plaintiff's confinement was disproportionate to his offense after May 5, 1973, and violated the Eighth Amendment, but ruled that the plaintiff was not entitled to money damages because he had failed to prove actual damages.

On appeal the second time, the Court of Appeals affirmed the district court's finding of qualified immunity on the First Amendment issue. It also affirmed the district court's finding that the plaintiff's request for declaratory and injunctive relief against future infringement of his religious beliefs was moot, but ruled that a request for an injunction against future use of the plaintiff's punishment record was not moot. The appellate court also affirmed the district court's finding of an Eighth Amendment violation, but reversed the ruling as to the date of the violation and the plaintiff's entitlement to damages. The case was again remanded.

The issues remanded by the Court of Appeals are:

(1) Whether Chapman's First Amendment right to free exercise of religion was violated and, if so, whether the record of his punishment should be expunged.

(2) The date the Eighth Amendment violation began.

(3) What damages Chapman is entitled to receive as a result of the Eighth Amendment violation.

On January 25, 1980, this court conducted an evidentiary hearing to determine the additional facts

necessary to carry out the Court of Appeals' mandate. From the testimony presented, the court makes the following additional findings:

(1) On October 11, 1972, Chapman was initially assigned to "short-term segregation" status, where he remained for some 2 to 3 months before being reassigned to "long-term segregation" or "control" status.

(2) Chapman was returned to "short-term segregation" status in June, 1973, and returned to the general prison population on July 25, 1973.

(3) While he was in "short-term segregation," the Adjustment Committee reviewed Chapman's assignment approximately every 10 days.

(4) During the time he was assigned to "control" status, he was reviewed by the Control Unit Committee approximately every 30 days.

(5) Chapman's assignment to segregation did not alter the physical conditions of his confinement. He had the same type of cell and food. He had books but could not go to the library. He had the opportunity to work. He had some physical exercise but could not go to the regular prison recreation activities.

(6) Chapman refused to handle pork because he believed that to do so would contravene the teachings of Elijah Muhammed and the principles of the Black Muslim religion of which Chapman was an adherent.

(7) The climate at Marion during the period of Chapman's segregation was one of extreme stress and tension due to work strikes and other inmate activities.

(8) Chapman had a history of disciplinary problems in the federal prison system, although the only charge of a violent nature was rescinded.

FIRST AMENDMENT ISSUE

The court must first determine whether punishing Chapman for refusing to follow a supervisor's order violates the First Amendment where the order was to handle pork and where Chapman informed the supervisor that it was against his religious beliefs as a Black Muslim to handle the pork. So far as this court can determine, this specific issue is of first impression.

Historically, the courts declined to interfere with the administrative decisions of prison officials. *Evans v. Moseley*, 455 F.2d 1084 (10th Cir. 1972) *cert. denied* 409 U.S. 889, 93 S.Ct. 160, 34 L.Ed.2d 146 (1977). This "hands-off doctrine", however, is slowly being replaced by the view that prisoners retain their fundamental constitutional rights, albeit subject to limitations, after incarceration.

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations but persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints."

Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam).

Free exercise of religion is among those rights retained by the incarcerated. *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). The

growth of the Black Muslim religion in particular has created increasing conflict within the prison and has forced the courts to focus on the permissible scope of restrictions on prisoners' religious rights. *Wilson v. Prasse*, 463 F.2d 109 (3rd Cir. 1972); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967).

The cases have involved refusal by prison officials to recognize the Black Muslim faith as a religion, *Bryant v. McGinnis*, 463 F. Supp. 373 (W.D.N.Y. 1978); denial of access to Black Muslim religious literature, group worship services and correspondence with spiritual leaders and refusal of requests for special diet, *Wilson v. Prasse, supra*; *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Barnett v. Rodgers, supra*; *Cooper v. Pate, supra*; *Bryant v. McGinnis*, 463 F. Supp. 373 (W.D.N.Y. 1978); *Cochran v. Rowe*, 438 F. Supp. 566 (N.D.Ill. 1977); and punishment for prisoner use of Muslim names, *Masjid Muhammad—D.C.C. v. Keve*, D.C., 479 F. Supp. 1311 (D.Del. 1979).

The courts, however, have developed no uniform test for determining when a prisoner's First Amendment rights have been violated. At best, they conduct a precarious balancing between free exercise of religion and the prison's interest in security, orderliness and administrative efficiency and convenience. Comment, *The Religious Rights of the Incarcerated*, 125 U. Pa. L. Rev. 812 (1977).

Some courts have held that the proper test for determining the validity of prison rules and regulations restricting practice of the Muslim religion is whether such rules are "unreasonable and unjustified with respect to the need of prison restraints and discipline." *Wilson v. Prasse, supra.* Other courts require the

government to show a compelling state interest to justify the restrictions on Islamic or any other religious activities plus a showing that the alleged restrictions are the least restrictive means necessary to protect that interest. *Walker v. Blackwell, supra; Barnett v. Rodgers, supra; Cochran v. Rowe, supra.*

The Seventh Circuit, in *Cooper v. Pate, supra,* its leading decision in this area, states:

> It is clear that prison authorities must not punish a prisoner nor discriminate against him on account of his religious faith. But although a prisoner retains his complete freedom of religious belief, his conviction and sentence have subjected him to some curtailment of his freedom to exercise his beliefs.
>
> Courts will closely scrutinize the reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion, and specially so where the adherents of one faith are more heavily restricted than the adherents of another.

382 F.2d at 521.

> Proof which would be more than adequate support for administrative decision in most fields does not necessarily suffice when we are dealing with the constitutional guaranty of freedom of religion, and with an exercise of religion so widely considered essential as worship services.

382 F.2d at 522.

Thus, the Seventh Circuit has not yet adopted a definitive analysis for this court to follow in determining when a prisoner's religious rights have been

violated. This court, being mindful that First Amendment rights have a "preferred" status, *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), has determined that the following analysis should apply in this case. First, the plaintiff must demonstrate that a legitimate religious practice is being unduly limited by prison regulations. Second, the burden of proof shifts to the government to show that the inference arises from a compelling state interest in prison security, discipline or administration and that it is among the least restrictive means reasonably available to prison officials.[1] *Barnett v. Rodgers, supra*; *See* Comment, *Prisoners' Rights: Restrictions on Religious Practices*, 42 U. Colo. L. Rev. 387 (1970).

The plaintiff contends that he was punished for his refusal to follow an order to handle pork. The plaintiff has testified that the handling of pork is for-

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[1] While this court is applying basically the same First Amendment analysis to the prison setting as it does to situations outside prison walls, *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), it must be noted that differences do exist. In prison cases, prison security, discipline and efficient administration are, by definition, compelling state interests. Further, while the stringent First Amendment test requires any necessary infringement to be the "least restrictive alternative," *Sherbert v. Verner, supra*, it would be improper for the courts to apply such a fine-line test to decisions made by prison administrators who have both the responsibility and expertise to determine how best to maintain prison discipline and security. *See Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967). Therefore, any infringement of a prisoner's First Amendment right arising from the state's interest in prison security, discipline or administration need only be among the least restrictive alternatives reasonably available to prison officials.

bidden by his Islamic religion and that Elijah Muhammed taught Black Muslims not to touch pork. The government has made much of the fact that the Islamic Bible, the Holy Koran, expressly forbids only the eating of pork and that one of the teachings upon which the plaintiff relies in his refusal to touch pork is the book *How Ye to Live* which was not published until 1972.

> To be protected, a particular form of religious expression need not be mandated by one's religion or even endorsed by a majority of its adherents, so long as it is an expression of a sincere, religiously based, conviction.

Masjid Muhammad—D. C. C. v. Keve, supra. This court concludes that the plaintiff's refusal to handle pork was an expression of a sincere, religiously based, conviction and qualifies as a legitimate religious practice.

The government has failed to sustain its burden of proving the requisite state interest in prison security, discipline or administration. The testimony has revealed no threat to prison security. In fact, the evidence has shown that the plaintiff completed his work detail after the pork had been removed by another prisoner and returned to kitchen detail with a different work assignment the following two days without incident. His disciplinary report revealed that Chapman "had a good attitude." Chapman's refusal to handle the pork created no substantial interference with prison administration. Of the approximately 500 prisoners at Marion in 1972-73, only some 20 were Black Muslims. It is a fair inference that not all Black Muslims worked in the kitchen. It placed no financial burden on the prison to switch the plaintiff's work assignment, and there was certainly mini-

mal, if any, effect on administrative efficiency. In *Barnett v. Rodgers, supra,* the court described the plaintiffs' request for one pork-free meal a day as:

> essentially a plea for a modest degree of official deference to their religious obligations. Certainly if this concession is feasible from the standpoint of prison management, it represents the bare minimum that jail authorities, with or without specific request, are constitutionally required to do, not only for Muslims but indeed for any group of inmates with religious restrictions on diet.

410 F.2d at 1001.

Assigning Chapman to a work detail in which he did not have to handle pork is substantially less burdensome to prison officials than the preparation of a pork-free meal in *Barnett.* This court concludes that the plaintiff's First Amendment right to free exercise of religion was violated by his punishment for refusal to follow an order to handle pork. The report of the incident and the disciplinary action taken against the plaintiff should be expunged from his records, and an injunction shall issue forbidding further use of such record.

EIGHTH AMENDMENT ISSUE

While *Chapman II* directed this court to determine when Chapman's period of segregation became disproportionate to his offense, without giving consideration to the threatening remark made by Chapman to Brown, the prison guard, 586 F.2d at 28, n.4, *but cf. Wolff v. McDonnell,* 418 U.S. 539, 573, 94 S.Ct. 2963, 2983, 41 L.Ed.2d 935 (1974) and *Chapman I,* 507 F.2d at 1252, it now appears that recent develop-

ments in the law may further prolong this already protracted litigation. Subsequent to the issuance of the mandate in *Chapman II*, and following the third evidentiary hearing in this court, and while the matter was under consideration, the United States Supreme Court issued its decision in *Rummel v. Estelle* [*Texas Department of Corrections*] —— U.S. ——, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). That decision dealing with disproportionality of offense and period of imprisonment collides with the mandates of *Chapman II* and requires a total reconsideration of the Eighth Amendment issue in this case.

The Supreme Court in *Rummel* held that the sentence of life imprisonment imposed upon a petitioner who was convicted of his third felony, obtaining $120.75 by false pretenses, did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The petitioner, who had been convicted in the Texas courts of two prior non-violent felonies (fraudulent use of a credit card to obtain $80 worth of goods or services and passing a forged check for $28.36), was sentenced to a mandatory life term under the Texas recidivist statute. He sought a writ of habeas corpus claiming that his life sentence was so disproportionate to the crimes he had committed as to violate the cruel and unusual punishment prohibition of the Eighth Amendment.

In denying Rummel's petition, the Supreme Court distinguished cases involving capital punishment:

> Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying to prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitu-

tionality of the punishment meted out to Rummel.

—— U.S. at ——, 100 S.Ct. at 1138.

The court also limited the application of *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), a case arising in the Philippine Islands in which the Court held the punishment of *cadena temporal* to be disproportionate to the offense of falsifying a public record. *Cadena temporal* involved "confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council." —— U.S. at ——, 100 S.Ct. at 1138-39. Even after confinement, the prisoner "goes from them to a perpetual limitation of his liberty." *Id.*

The Supreme Court stated:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative. Only six years after *Weems*, for example, Mr. Justice Holmes wrote for a unanimous Court in brushing aside a proportionality challenge to concurrent sentences of five years imprisonment and cumulative fines of $1,000 on each of seven counts of

mail fraud. See *Badders v. United States*, 240 U.S. 391 [36 S.Ct. 367, 60 L.Ed. 706] (1916). According to the Court, there was simply "no ground for declaring the punishment unconstitutional." *Id.*, at 394 [36 S.Ct. at 368].

Such reluctance to review legislatively mandated terms of imprisonment is implicit in our more recent decisions as well. As was noted by Mr. Justice WHITE, writing for the plurality in *Coker v. Georgia*, *supra* [433 U.S. 584] at 592 [97 S.Ct. 2861 at 2866, 53 L.Ed.2d 982], our Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgments should be informed by objective factors to the maximum possible extent." Since *Coker* involved the imposition of capital punishment for the rape of an adult female, this Court could draw a "bright line" between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by Mr. Justice STEWART in *Furman*, *ante* [408 U.S. 238, 92 S.Ct. 2726, 38 L.Ed.2d 346], this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.

Similarly, in *Weems* the Court could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system. But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult

> to square with the view expressed in *Coker* that the Court's Eighth Amendment judgments would neither be nor appear to be merely the subjective views of individual Justices.

The court reads *Rummel* as disapproving the application of disproportionality tests in cases arising under the Eighth Amendment except in capital or other factually unique cases. As the court found in *Rummel*, the judiciary is ill equipped to make any kind of objective constitutional distinction between one term of years and a shorter or longer sentence.

The Supreme Court's rationale is equally applicable in the context of prisons. This court lacks expertise in prison administration and any judgment it can make as to the disproportionality of giving a prisoner a certain term in segregation for infraction of disciplinary regulations can only be the most blatant exercise of subjectivity on the part of the court.

At the January 25, 1980, hearing in this court, prison officials testified that segregation is not for punishment purposes. Its purpose, according to the testimony, is to help protect the rights of other inmates, help operate the institution in an orderly fashion, and help protect the individual in control. It is precisely these auxiliary interests which, under the rationale of *Rummel*, should be left largely within the discretion of prison disciplinary officials and administrative regulations.

In *Rummel*, the Supreme Court discussed the purpose of the recidivist statute there in question:

> Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate

> that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

By analogy, these are the same concerns which apply in the context of prison discipline.

In light of *Rummel*, this court holds that Chapman's length of stay in segregation did not work a violation of his rights under the Eighth Amendment to be free from cruel and unusual punishment.

IT IS THEREFORE ORDERED AND ADJUDGED that any report of the incident of October 9, 1972, at Marion Federal Penitentiary in which the plaintiff refused to handle pork and the resulting disciplinary proceedings and confinement to segregation be expunged from the plaintiff's record in the Bureau of Prisons.

IT IS FURTHER ORDERED that the defendants and each of them be, and they hereby are, enjoined from any further reference to or use of the subjects expunged from the plaintiff's records.

IT IS FURTHER ORDERED that the plaintiff take nothing and the defendants go hence without pay.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

No. 75-2-041

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF

vs.

MR. GEORGE PICKET, ET AL., DEFENDANTS

[Filed Apr. 4, 1977]

MEMORANDUM AND ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Seventh Circuit. *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974). A bench trial was held on November 3 and 4, 1976. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matter of this suit and the parties hereto pursuant to 28 U.S.C. § 1331(a).

2. Plaintiff's amended complaint sought money damages and declaratory and injunctive relief for

alleged violations of his First and Eighth Amendment rights, specifically: (a) a declaration that his confinement to segregation was an unconstitutional restraint on his freedom of religion; (b) a declaration that said confinement constituted cruel and unusual punishment; (c) an injunction prohibiting defendants from administering disciplinary punishment in violation of the First and Eighth Amendments; (d) expungement of certain records; and (e) $50,000 actual and $50,000 punitive damages.

3. At all times relevant to this action, plaintiff was a black citizen of the United States and a member of the Islamic faith. He was a prisoner at the Marion Federal Penitentiary in Marion, Illinois, from October, 1972, until May, 1975. Plaintiff was released on parole on August 6, 1975, and remains on parole until 1988.

4. At all times relevant to this action, defendant GEORGE PICKETT (PICKETT) was the Warden of the Marion Federal Penitentiary. PICKETT had responsibility for the confinement, management, care and treatment of Marion inmates, and for the supervision of employees of the institution.

5. At all times relevant to this action, defendant FRED FREY (FREY) was Associate Warden, Programs, at the Marion Federal Penitentiary. He was responsible for the maintenance of inmate discipline at Marion and frequently sat in on meetings of the various disciplinary committees at the prison. FREY had the duty of reviewing the disciplinary committees' actions and had the power of referring decisions for additional consideration by such committees.

6. At all times relevant to this action, defendant CHARLES FENTON (FENTON) was Associate Warden, Operations, at the Marion Federal Peni-

tentiary. He acted in an advisory capacity to the Adjustment Committee.*

7. At all times relevant to this action, defendants JACK CULLEY (CULLEY), EARL BUZZARD (BUZZARD), and E. M. CAGE (CAGE) were members of the Adjustment Committee and the Segregation Committee of the Marion Federal Penitentiary. These defendants had the duty of examining written charges of alleged prison rule violations by inmates and of taking appropriate actions. CULLEY was also the Control Programs Manager at Marion and was responsible for the operation of the prison's segregation and control units and for review of decisions by disciplinary committees to place inmates in segregation.

8. At all times relevant to this action, defendant J. E. BROWN (BROWN) was a Senior Officer Specialist in charge of the food service department at the Marion Federal Penitentiary. He had the duty of directing the activities of certain food service workers, including plaintiff CHAPMAN.

9. On or about October 4, 1972, plaintiff was transferred to the Marion Federal Penitentiary from Leavenworth Penitentiary.

10. On October 9, 1972, while assigned to the kitchen detail, plaintiff was instructed by his supervisor to clean trays containing pork.

11. Citing his religious beliefs, plaintiff refused to remove the pork from the trays. At that time, BROWN offered plaintiff equipment for cleaning the trays, including heavy aprons, rubber gloves, utensils,

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*(There being no evidence that he had official duties with regard to the acts plaintiff has complained of, defendant FENTON cannot be liable in this cause.)

scrapers, etc. Plaintiff continued to refuse to do the work.

12. BROWN advised plaintiff that he would write a disciplinary ticket on plaintiff if he did not handle the pork.

13. When so advised, plaintiff remarked to BROWN that his God, Allah, had once before punished a correctional officer who had ordered him to handle pork in contravention of his religious beliefs, by blowing him out of an oven at the Leavenworth Federal Penitentiary.

On August 9, 1972, an explosion in an oven at the Leavenworth prison kitchen resulted in the death of a kitchen employee. An investigation disclosed that the explosion occurred as the result of mishandling of relay switches in the ovens by food supervisors. Plaintiff was never suspected of causing the explosion. At the time of the explosion, plaintiff was assigned to the furniture workshop at Leavenworth. A detailed report on the explosion was received by FREY in October of 1972 after the Adjustment Committee meeting discussed *infra*, paragraph 16. The report concluded that the explosion was attributable to the mishandling of relay switches by the food supervisors at Leavenworth. FREY testified that he "did not seek to ascertain Mr. Chapman's whereabouts" on the date of the explosion.

14. Following plaintiff's refusal to handle the pork, BROWN filed an incident report charging plaintiff with violating prison code 303, "Failing to perform work as instructed by a supervisor."

15. Prior to the hearing on this incident, the fact that a Leavenworth guard had been killed in an oven explosion, but not the surrounding circumstances, was confirmed by Leavenworth officials to the Marion authorities.

16. On October 11, 1972, CULLEY, CAGE and BUZZARD met to act on BROWN's incident report. Plaintiff admitted the facts of the incident report, and explained to the Committee that as a Black Muslim he was prohibited by his religion from handling or serving pork. Their decision was to place plaintiff in segregation. Defendant CULLEY testified that the sole reason for the Committee's meeting was plaintiff's alleged violation of prison code No. 303, "Failing to perform work as instructed by a supervisor," and that the decision to place plaintiff in segregation was predicated solely on the alleged violation of code No. 303. The committee action report filed by the aforementioned defendants stated that plaintiff was being placed in segregation for refusing to perform work. A box on the report, in which the committee may indicate additional prison code violations, was left blank. CULLEY testified that at the time of their Adjustment Committee meeting, the aforementioned defendants were aware of the remark made by plaintiff about Allah blowing a food employee out of an oven.

17. FREY participated in the October 11 meeting in which plaintiff was sentenced to confinement in segregation. He testified that he "reviewed and confirmed" the Adjustment Committee's decision to place CHAPMAN in segregation, and that by confirming the committee's actions he approved of its decision and added his authority to the committee's mandate.

18. PICKETT was aware of plaintiff's placement in segregation on October 11, 1972, and was aware of his continued confinement therein until the day of his release, July 25, 1973.

19. While in segregation, plaintiff did not eat foods containing pork. He was not provided added portions of items not containing pork.

20. A Federal Bureau of Prisons policy statement, dated 7-7-70, stated that "A committed offender may abstain from eating those food items which are prohibited by his religion" and that he "may receive added portions of non-rationed food items from the main serving line" to make up for the attendant nutritional deficiency.

21. Subsequent to October 11, 1972, various committees in which CULLEY, CAGE, BUZZARD and FREY participated, met on a number of occasions to consider plaintiff's status. Plaintiff was released from control status on July 25, 1973.

22. During his confinement in segregation, plaintiff made at least one "Institutional Request" of PICKETT, in which he sought an explanation of his confinement and requested immediate release. He did not receive a reply.

23. On March 15, 1973, PICKETT received a copy of a letter from Norman A. Carlson, Director of the Federal Bureau of Prisons, to Congressman Charles R. Rangel. In the letter, Carlson stated: "We have re-examined the situation and have communicated to the heads of our facilities instructions not to assign individuals to details where they must work with pork if it is against the religious beliefs of those men."

CONCLUSIONS OF LAW

A. OFFICIAL IMMUNITY

As officials of the Executive Branch, defendants are entitled to assert the defense of official immunity to damages for alleged deprivations of constitutional rights.

The Seventh Circuit opinion in this case states:

> On remand, which we order *infra*, the defendants may argue that the circumstances in which dam-

> ages may be recovered against federal officials for official acts first enunciated in *Barr v. Matteo*, 360 U.S. 564 . . ., and further developed in our decisions in *Scherer v. Brennan* . . .; *Skolnick v. Compbell* . . .; and *Scherer v. Morrow* . . .; have not been demonstrated by Chapman.

Chapman v. Kleindienst, 507 F.2d 1246, 1249 n.4 (7th Cir. 1974) (citations omitted). At the trial on remand, the defendants did so argue, and the issue of official immunity to money damages is before the Court.

The law concerning official immunity is not a model of clarity, and is currently undergoing modification and redefinition. Indeed, the cases cited in the quotation above have already been superseded both by the Circuit Court itself and by other courts, including the United States Supreme Court.

The three Seventh Circuit cases cited expressed a rather broad view of the defense of official immunity available to federal officers. However, this position has been greatly eroded by a series of decisions in the Supreme Court and several Circuit Courts. Originally developed in the context of cases under the Civil Rights Act of 1871, 42 U.S.C. § 1983, the new doctrine of *qualified* official immunity is being applied more widely to federal officers of the executive branch.

Scheuer v. Rhodes, 416 U.S. 232 (1974), was a § 1983 action arising out of the May, 1970, Kent State tragedy. The defendants included Ohio's governor and National Guard officers and troops. The Court noted the earlier case of *Pierson v. Ray*, 386 U.S. 547 (1967), in which it was held that a police officer sued under § 1983 has available the defense of "good faith and probable cause." Many other officials, such as defendants in *Scheuer*, have a "virtually

infinite" range of decision-making choices, yet share with police a frequent need to act "swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." 416 U.S. at 246.

Particularly in times of civil disorder,

> [t]hese considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-248.

The Supreme Court has reached a similar conclusion in two other § 1983 cases. *Wood v. Strickland*, 420 U.S. 308 (1975), was a suit against school board members for wrongful expulsion of two high school students. There the Court said:

> The disagreement . . . over the immunity standard . . . has been put in terms of an 'objective' versus a 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, undisputable law on the part of one entrusted with supervision of stu-

> dents' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 . . . a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges . . . . Therefore . . . a school board member is not immune from liability for damages under § 1983 *if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause deprivation of constitutional rights or other injury to the student.* That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson v. Ray*, 386 U.S., at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

420 U.S. at 321-322 (emphasis added). This test was applied verbatim to state mental health facility administrators in *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975).

This line of cases has been followed in the Seventh Circuit in *Knell v. Bensinger*, 522 F.2d 720 (7th Cir. 1975), a case challenging, under § 1983, conditions of punitive segregation in Illinois state prisons. The Circuit Court there applied the "two-pronged" test of *Wood v. Strickland*, 420 U.S. 308 (1975), to state

correctional administrators. It did so for two reasons. First, the Supreme Court itself had extended the *Strickland* test to state mental health officials in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), and *Gamanis v. O'Connor*, 422 U.S. 1052 (1975). Second, the concern in *Strickland* "over permitting ignorance of settled principles of law" to be an excuse for abuse of constitutional rights of persons under the supervision of government officials, seemed similarly appropriate in the prison setting.

The "two prongs" of the *Strickland* standard are: (1) "whether . . . defendant acted 'sincerely and with a belief that he [was] doing right;' " and (2) "whether defendant . . . acted 'with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.' " 522 F.2d at 725. These are denominated *subjective* bad faith and *objective* bad faith, respectively.

The *Knell* court stated as the major policy consideration underpinning the doctrine of official immunity, "the necessity of insuring principled and conscientious governmental decision making by affording some measure of freedom from fear of personal liability for the official exercise of discretion and the performance of required duties." 522 F.2d at 724. Analyzing the defendant's conduct in light of "the law as it existed at the time of the complained of actions," the Court found that he was entitled to the immunity. "[D]efendant might well have reasonably believed that . . . the denial of access to the Courts was *de minimus* and justified by the exigencies and considerations of prison discipline." *Id.* at 727.

Several Circuit Courts have applied the logic and analysis of the § 1983 cases to actions against federal

officials who claim immunity. *Economou v. United States Department of Agriculture*, 535 F.2d 688, 695 n.7 (2d Cir. 1976). The Seventh Circuit has extended the "good faith and probable cause" immunity of *Pierson v. Ray*, 386 U.S. 547 (1967), to federal law enforcement officers in *Tristis v. Backer*, 501 F.2d 1021 (7th Cir. 1974). It has also been applied to other federal officials in *Estrada v. Hills*, 401 F.Supp. 429 (N.D. Ill. 1975).

In summary:

1. Immunity is available only for acts performed in the course of official conduct.

2. The public policy underlying official immunity reflects the necessity of insuring principled and conscientious governmental decision-making by affording some measure of freedom from fear of personal liability for the official exercise of discretion and performance of required duties.

3. The nature of the immunity varies according to (a) the scope of discretion and responsibility of the office; and (b) all of the circumstances as they reasonably appeared at the time.

4. There is no immunity if (a) the official knew or reasonably should have known that the complained-of act would violate plaintiff's constitutional rights; or (b) the action was taken with malicious intention to cause a deprivation of constitutional rights or other injury.

5. But compensation is allowed only if there was such an impermissible motivation, or such disregard for clearly established rights, that the official action cannot reasonably be characterized as being in good faith.

B. FIRST AMENDMENT AND RELATED CLAIMS

Plaintiff presents a number of claims to the Court relating to or arising out of the alleged deprivation of his First Amendment rights. First Amended Complaint, ¶ 20. The Court finds as follows:

1. *Decision to Discipline.* Plaintiff attacks the initial decision finding him guilty of a violation of prison regulations, as an unconstitutional infringement of his freedom of religion, and seeks declaratory, injunctive, compensatory, and punitive relief. However, his request for declaratory and injunctive relief has been rendered moot by the adoption of a new Bureau of Prisons policy which prohibits assigning to kitchen clean-up detail those prisoners who are opposed on religious grounds to the handling of pork. *See* letter from Norman A. Carlson to Honorable Charles B. Rangel, March 9, 1973, Plaintiff's Exhibit No. 4.

As to monetary damages, they are prohibited by the doctrine of qualified official immunity, which the Court finds is applicable to the defendants in this case:

(a) The acts complained of were performed in the course of official duties.

(b) The public policy referred to *supra*, p. 12, will be served by recognizing the immunity in this context.

(c) The discretion and responsibility of prison officials are of the widest scope, thereby broadening the immunity to be granted. There is nothing in the circumstances, as they reasonably appeared at the time of the incident and the Adjustment Committee hearing to remove the cloak of immunity from defendants.

(d) While the defendants were aware that plaintiff was refusing the work because of his religious beliefs, plaintiff has failed to prove that they "knew or reasonably should have known that the complained-of act would violate plaintiff's constitutional rights." On the contrary, there was evidence that defendants were aware of other Muslims who did in fact handle pork under similar circumstances. There is no evidence whatsoever that defendants acted with a "malicious intention" to deprive plaintiff of his freedom of religion.

(e) Finally, there is insufficient basis in the record for a finding that defendants' actions cannot reasonably be characterized as being in good faith.

2. *Pork-free diet.* As to his claim that he was not provided food substitutes for pork items while he was in segregation, plaintiff presented no evidence that it was within the area of responsibility of any of the named defendants to correct this omission, or that they had any official duty whatsoever with respect to his diet, with the exception of defendant PICKETT. In fact, on the basis of the evidence on the record, it would be mere speculation to assume that any defendant except PICKETT had any responsibility for the diet of prisoners in segregation. However, PICKETT cannot be held liable for money damages under the doctrine of *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Although that case was decided in the context of a § 1983 action, its teachings extend by analogy to the present action, in the same fashion as do the other official immunity cases. *Rizzo* held that a supervisory employee is not liable under § 1983 if he or she played no affirmative part in depriving a plaintiff of any constitutional right; such an affirmative act by PICKETT has not been shown here.

3. *Religious practices.* Plaintiff asserted in his complaint that he was denied the opportunity to attend religious services or observe religious holidays, and that he was deprived of religious materials while in segregation. Plaintiff failed to offer any evidence whatsoever, even by his own testimony, as to the first two points. As to the third, he testified that at least some of the materials were returned to him. No details were provided, and plaintiff has failed to meet his evidentiary burden both as to the extent of the remaining deprivation, if any, and the extent of damages resulting therefrom.

4. *Good time, reduction in custody.* Plaintiff claims that his confinement to segregation prevented accumulation of good time credit and prevented his being considered for reduced custody (e.g., honor farm). The Court believes that as consequences of the initial decision to punish, these are also under the doctrine of official immunity from damages. Further, both as to damages and equitable relief, plaintiff failed to prove that it was reasonably certain he would receive good time credit, or how much credit he would have received, and he failed to prove that it was reasonably certain he would have received a reduction in custody.

5. *Wages.* While the Court believes official immunity would prevent recovery of damages for any lost wages while he was in segregation, plaintiff also failed to prove the amount of wages lost. He testified that he had earned money working in the print shop, but he couldn't remember how much; testimony as to his wages was not elicited from defendants, who presumably could have provided it.

6. *Expungement.* The Court will not order expungement, regardless of the merits (which the

Court does not reach), because plaintiff has failed to show that his current disciplinary record will have any adverse effect on any possible future prison discipline, should he violate parole and be re-incarcerated.

7. *Chilling effect.* The Court believes the doctrine of official immunity protects defendants from damages for any "chilling effect" on plaintiff's First Amendment rights. Further, the Court is unaware of any precedent for awarding money damages for chilling effect per se. Finally, plaintiff offered no evidence, testimonial or otherwise, showing such a chilling effect.

8. *Opportunity for parole.* The same considerations apply here as in No. 4 above, concerning good time and reduction in custody, and no relief will be granted.

9. *Legal materials.* Plaintiff offered no evidence as to lack of access to legal materials while he was confined to segregation.

C. EIGHTH AMENDMENT CLAIMS

Plaintiff's claim of cruel and unusual punishment is premised upon two distinct classes of alleged deprivation. The Court finds as follows:

1. *Conditions of confinement.* Plaintiff's allegations regarding conditions of segregation will be discussed serially:

(a) inadequate medical and dental treatment —plaintiff presented no evidence on this point.

(b) lack of exercise—plaintiff was restricted to his nine by eleven foot cell for twenty-three to twenty-three and one-half hours per day, and presumably was allowed to exercise only in the

remaining time. This was substantially less exercise than was allowed and available in the general population.

(c) lack of society with other inmates—plaintiff proved that his association with other inmates while he was in segregation was virtually nil.

(d) lack of society with family and friends—plaintiff testified that he only had one visitor (an attorney) while he was confined to segregation, and did not know that any visitors were prevented from seeing him. His complaint was that he could only observe his visitor through glass and had to converse with the visitor by telephone.

(e) no educational or vocational training—plaintiff was allowed to complete his G.E.D. (high school equivalence test) while in segregation. However, he was not allowed to participate in vocational-educational programs.

The Court finds that neither these conditions individually nor the combination of conditions is so inhumane as to constitute cruel and unusual punishment. Other than lack of exercise, the conditions are those which are merely incident to that deprivation of privileges accompanying confinement to segregation. The lack of opportunity for exercise does not in itself rise to the level of an Eighth Amendment violation.

2. *Length of confinement.* Although plaintiff was charged with and found guilty of failure to perform work, defendants testified that in deciding to sentence him to segregation, they considered the threat which plaintiff made to defendant BROWN. There is no allegation that confinement to segregation for

any period of time as punishment for his infraction was per se cruel and unusual punishment.

Plaintiff was confined to segregation for over nine months, during which time his case was periodically reviewed. Defendants' Exhibits No. 3 through No. 9 are records of reviews of plaintiff's status from February 21, 1973 to July 25, 1973. While we have not been presented with a complete record, it is sufficient to form a basis for the Court's determination that plaintiff's confinement *became* excessive and therefore constituted a violation of his Eighth Amendment rights.

Plaintiff was originally confined for an indeterminate term to the segregation unit. His behavior and attitude while so confined could have been considered in the decision to retain him in segregation or release him to the general population. On February 21, 1973, his adjustment was described as "marginal." This determination, which was unrebutted by plaintiff at trial, could sustain the opinion of the committee to retain plaintiff in segregation. On February 21, plaintiff had been in segregation four months and ten days.

However, on March 21, 1973, and thereafter, plaintiff's adjustment was described as "good," or he was described as "adjusting well." The process of releasing him to the general population, which began on April 25, 1973, with a decision of the committee to solicit comments from segregation unit officers, was not completed until July 25, 1973. During plaintiff's confinement, the Marion Prison had adopted a two-tiered segregation, or "control," status system, which required that an inmate be moved into short term control before being released into the general population. This was not accomplished in plaintiff's case until June 20, 1973.

Absent some clear justification on defendants' part for maintaining plaintiff in segregation status for over nine months based upon his failure to perform assigned work, a confinement of such length is cruel and unusual. *Adams v. Carlson*, 368 F. Supp. 1050 (E.D.Ill. 1973). The only justification which defendants have offered is plaintiff's lack of adjustment to segregation. However, there is support in the record for this justification for substantially less than the total time plaintiff was so confined. Therefore, the excess time must be considered as constituting a violation of plaintiff's Eighth Amendment rights.

If plaintiff had been recommended for short term control on March 21, 1973, when his adjustment was noted as favorable, he could have been so placed on April 25, 1973. He then could have been released to the general population after a ten day review, on or about May 5, 1973. The Court finds that the eighty-one day period from May 5 to July 25, 1973, was excessive and therefore violated the Eighth Amendment.

There is some question whether the defense of official immunity is available to a charge of cruel and unusual punishment. Plaintiff has cited the case of *Campise v. Hamilton*, 382 F. Supp. 172 (S.D. Tex. 1974), which might be read to stand for the proposition that the defense is not available. There is some force to the argument that the very nature of a violation of the Eighth Amendment would preclude the imposition of the immunity defense.

However, the Court finds that regardless of its availability, defendants have not met the conditions of the defense of qualified official immunity. Defendants here knew or should have known that their confinement of plaintiff to segregation for a period of

over nine months, for failure to perform assigned work—after the time when his adjustment was reported as "good"—was a violation of his clearly-established right to be free of cruel and unusual (disproportionate) punishment. Under those circumstances, such a confinement cannot reasonably be characterized as being in good faith.

The only remaining issue is that of damages. The Court finds that plaintiff has failed to show either that actual damages were suffered, or in what amount, beyond merely suggesting the figure of $25.00 per day. In *Adams v. Carlson*, 386 F. Supp. 1050 (E.D. Ill. 1973), plaintiffs who were successful under similar circumstances were released from segregation and no money damages were awarded. Plaintiff here is already on parole; therefore, no affirmative relief need be awarded. The record in this case does not support an award of punitive damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's confinement in segregation beyond May 5, 1973, be, and the same is hereby, declared to be excessive in violation of his rights under U.S. const. amend. VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other relief prayed for in plaintiff's First Amended Complaint be, and the same is hereby, denied.

ENTERED this 4th day of April, 1977.

/s/ Henry S. Wise
Chief Judge

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge

Nos. 84-2842 and
84-2913

EDWARD JOSEPH X. CHAPMAN
PLAINTIFF-APPELLEE, CROSS-APPELLANT

vs.

GEORGE W. PICKETT, Warden,
U.S. Penitentiary, Marion, et al.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES

September 15, 1986

Appeals from the United States District Court for the
Central District of Illinois, Springfield Division

No. 84-C-3001—J. WALDO ACKERMAN, Judge

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

Nos. 84-2842 and
84-2913

EDWARD JOSEPH X. CHAPMAN, PLAINTIFF-APPELLEE

v.

GEORGE W. PICKETT, Warden,
U.S. Penitentiary, Marion, et al.,
DEFENDANTS-APPELLANTS

Appeals from the United States District Court for the Central District of Illinois, Springfield Division

No. 84-C-3001—J. WALDO ACKERMAN, Judge

February 5, 1987

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by the defendants-appellants, a vote of the active members of the court was requested and a majority * of the members of the court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing *en banc* be, and the same is, hereby DENIED.

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* Circuit Judges Richard A. Posner, John L. Coffey, Joel M. Flaum and Frank H. Easterbrook voted to grant rehearing *en banc*.

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EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-28

GEORGE W. PICKETT, ET AL.,

Petitioners,

v.

EDWARD JOSEPH X. CHAPMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Thomas F. Geraghty
Northwestern University
Legal Clinic
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 908-8576
(Counsel of Record)

Of Counsel:

John S. Elson
Northwestern University Legal Clinic
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 908-8576

Stuart J. Chanen
Sachnoff Weaver & Rubenstein, Ltd.
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
(312) 207-1000

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-28

GEORGE W. PICKETT, ET AL.,
Petitioners,

v.

EDWARD JOSEPH X. CHAPMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Edward Chapman respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the judgment of the Seventh Circuit Court of Appeals in this case.

Respondent does not quarrel with any individual fact set forth in the petition. However, because the petition creates some confusion over two central points, the following brief additional statement is provided.

STATEMENT OF THE CASE

This litigation was commenced in 1973 as a result of respondent's 289 day confinement in punitive segregation for refusing on religious grounds to clean pork from food trays. From the outset, respondent's complaint alleged a violation of both his First and Eighth Amendment rights. (Petition 4; App. 35a, 36a, 45a-46a, 60a, 74a, 92a, 107a). The First Amendment claim was based solely on the impermissible reason for his punishment. The Eighth Amendment claim was based on the disproportion between the reason for and the length of his punishment.

Not only were distinct constitutional violations alleged, but the courts below found distinct First and Eighth Amendment

violations. In 1980, the district court concluded "that the plaintiff's First Amendment right to free exercise of religion was violated by his punishment for refusal to follow an order to handle pork" (App. 100a). The court therefore expunged the disciplinary action from the respondent's record and enjoined petitioners from any further use of such record (App. 100a). Because the court of appeals had previously ruled that "official immunity [was] available to the defendants as a defense to Chapman's First Amendment claim for monetary damages" (App. 52a), no monetary damages were awarded for the First Amendment violation.

The court of appeals also ruled, however, that "[a]lthough we have held that defendants enjoy a qualified immunity from monetary damages regarding Chapman's First Amendment claim, this does not extend to the Eighth Amendment violation" (App. 58a). The court recognized that the question of whether defendants "knew or should have known" that the length of Chapman's confinement in segregation "was or became grossly disproportionate to the offense with which he had been charged" (App. 58a-59a) required an inquiry different from that of whether defendants knew or should have known that the reason for placing Chapman in confinement - his refusal to clean pork off food trays -- violated a protected First Amendment right (App. 51a-52a).

This is a crucial distinction which is blurred by the petitioners' statement of the case and by the dissenting opinion below. The premise of the dissenting judge that "[t]his first amendment case has turned into an eighth amendment one because of the court's holding in 1978 that the defendants have qualified immunity from damages for punishing Chapman on account of his religious beliefs" (App. 15a (citation omitted)) is simply wrong. The court's ruling on First Amendment immunity does not control the Eighth Amendment immunity inquiry, and never has. This has always been an Eighth Amendment case, and the distinct questions of immunity under the two claims have always been considered as separate issues.

Therefore, the Eighth Amendment Harlow inquiry which is at issue here, and which the court below properly applied, asks what petitioners knew or should have known was an acceptable length of Chapman's punitive segregation in light of the nature of his offense. The question of whether petitioners knew or should have known that Chapman's refusal to touch pork was a constitutionally justifiable reason for his initial punishment is thus not relevant to the Eighth Amendment claim.

The second crucial point is that the issue raised in the petition was not raised in the district court below. One reason for petitioners' failure to raise it in the district court may have been that their own expert, Charles E. Fenton, who was an assistant warden at Marion penitentiary during Mr. Chapman's confinement in segregation (App. 78a), testified that "an inmate charged with refusal to work under the facts [of this case] would receive from three days to a week in segregation" (App. 78a). The district court judge found this testimony "especially credible" (id.) and held that Chapman's confinement became disproportionate after seven days, awarding him $7,000 in damages for 282 days of unlawful segregation (App. 82a).

The court of appeals noted in affirming the district court (App. 1a-15a, 126a), that "[defendants] did not advance a qualified immunity argument before the district court in this case" (App. 10a-11a n. 4). The court below added that a previous panel of the court of appeals correctly decided the immunity issue (id.)[1] and it cited additional authority to support that earlier ruling (id.).

---

[1] As a pure housekeeping matter, the cite to the previous opinion in footnote four (App. 10a-11a n.4), American Intern. Ins. Co. v. Vessel SS Fortaleza, 585 F.2d 22, 28 (7th Cir. 1978), is incorrect. It should read: Chapman v. Pickett, 586 F.2d 22, 28 (7th Cir. 1978). The error is West Publishing Company's, not petitioners'.

REASONS FOR DENYING THE WRIT

I. Petitioners Waived The Qualified Immunity Issue By Not Presenting It In The Trial Court Below.

This Court has traditionally not reviewed issues that were not properly raised in the courts below. University of California Regents v. Bakke, 438 U.S. 265, 283 (1978); Trailmobile v. Whirls, 331 U.S. 40, 50 (1946); Hormel v. Helvering, 312 U.S. 552, 556 (1940). The immunity issue presented for review in the petition was never raised in the district court. Moreover, petitioner also failed to raise it in their first two briefs to the court of appeals below. After the case was fully briefed and set for oral argument, petitioners, hoping that they might be able to assert an absolute immunity defense, requested and received a postponement of oral argument until the Supreme Court decided Cleavinger v. Saxner, ___ U.S. ___, 106 S.Ct. 496 (1985). It was only after the Supreme Court's decision in Cleavinger foreclosed defendants' potential absolute immunity argument that petitioners raised a qualified immunity argument in a supplemental brief filed with the court of appeals. The issue was therefore waived and accordingly should not be considered by this Court.

The waiver rule protects both a party's right to "offer all the evidence they believe relevant to the issues" and the district court's function to hear and evaluate evidence and decide "issues which the trial tribunal is alone competent to decide." Hormel, 312 U.S. at 556. Application of this rule is particularly appropriate here because it is now well established that the Harlow v. Fitzgerald qualified immunity standard requires an objective, but nevertheless fact-specific inquiry. Anderson v. Creighton, No. 85-1520, slip op. at 6 (June 25, 1987); id. at 12 (Stevens, J., dissenting); Harlow, 475 U.S. 800, 818 (1982); id. at 821 (Brennan, J. concurring). Because the qualified immunity defense was not raised by the petitioners in the district court below, the respondent had no opportunity to formulate or to address that fact specific inquiry.

Moreover, should petitioners now be permitted to raise a qualified immunity defense, Mr. Chapman would clearly be prejudiced. Petitioners' own expert, who was Marion's assistant warden at the time of Chapman's confinement in punitive segregation, testified that three to seven days was the proper punishment for Mr. Chapman's refusal to clean trays containing pork. This testimony in itself provides convincing evidence that reasonable prison officials knew that 289 days in segregation was excessive punishment. However, had petitioners raised a qualified immunity defense, Mr. Fenton would undoubtedly have been asked what prison officials knew to be the law at that time. Such a question would have been quite revealing in light of the fact that at the time of the respondent's confinement in segregation, Marion prison officials had been defendants in Bryant v. Harris, 465 F.2d 365 (7th Cir. 1972), a case in which the Seventh Circuit held that Marion prisoners confined in indefinite segregation for religious reasons stated valid Eighth Amendment causes of action. Id. at 367. If Mr. Chapman had been put on notice of the qualified immunity defense, he could have made an appropriate record. Permitting the petitioner to raise the qualified immunity defense in the appellate courts without having raised it in the district court below would therefore deprive the respondent of his day in court on that issue.[2]

Because the issue raised by the petition was not raised in the district court, and was thereby not preserved for appeal, this Court should deny the writ.

---

[2] The dissenting judge below would not have found a waiver of this issue because it was raised in 1978 (App. 17a). However, Harlow v. Fitzgerald was not decided until 1982. Petitioners' argument in this Court is that the court below missapplied the Harlow v. Fitzgerald standard. The argument that Harlow has been missapplied could only have been raised after the Harlow, decision, especially since the Harlow immunity analysis requires a "fact-specific" inquiry. See Anderson, slip op. at 6.

II. The Petition Raises a Narrow Factual Issue That The Court Below Correctly Resolved.

This case does not implicate a change or new interpretation of either qualified immunity or Eighth Amendment law. The court of appeals below considered and applied the proper qualified immunity analysis to the facts of this case. The Petition raises the narrow factual question of whether Marion prison officials should have known in 1972 that Chapman's confinement in segregation was disproportionate to his "offense" of refusal to work on religious grounds. This issue could never realistically recur and is too narrow to warrant review by this Court on certiorari. Thus, resolution of the question presented by the petition turns only on the facts of this case and is of interest only to these parties. For these reasons, certiorari should be denied.

Moreover a petition in 1987 regarding application of a standard announced in 1982 to facts which occurred in 1972 does not offer the timeliness, importance, and clarity of issues necessary for this Court to exercise its discretionary review. Certainly the great evolution in the law of prisoners' rights since 1972 makes it extremely unlikely that prison officials could find meaningful guidance in this Court's substantive determination of what law was or was not established in 1972.

Not only is the issue raised by the petitioner a narrow factual one, but also it is one that was rightly decided by the two court of appeals panels and one district court judge who have considered it. In 1978, the Seventh Circuit affirmed (App. 58a-59a) the district court's ruling (App. 123a-124a) that petitioners were not entitled to the defense of qualified official immunity on the Eighth Amendment claim. The court correctly applied the objective "knew or should have known" standard, holding that petitioners "should have known that the punishment was grossly excessive" (App. 59a). This conclusion is supported by the existing case law, by Mr. Fenton's testimony, and by documents written by the defendants at the time of the respondent's confinement in segregation. (See, e.g., App. 8a).

In its opinion below, the court of appeals addressed the issue of the application of the doctrine of qualified immunity to the facts of this case, responding primarily to the arguments raised in Judge Easterbrook's dissent. After noting that defendants "did not advance a qualified immunity argument in the district court in this case" (App. 10a-11a n. 4),[3] the court reviewed its 1978 opinion and concluded that Harlow v. Fitzgerald did not change the 1978 result (Id.).[4] The court did, however, further particularize the legal basis of the Eighth Amendment right at issue in 1972. The court stated: "In 1972 it was established that excessive punishment in segregated confinement for the exercise of a religious right could subject prison officials to liability. See Bryant v. Harris, 465 F.2d 365, 367 (7th Cir. 1972)" (App. 10a-11a n. 4). In both of these opinions, the court of appeals applied the qualified immunity standard in exactly the way that the petition proposes, considering whether "petitioners reasonably could have known that their actions violated [the] general legal principle" of disproportionate punishment." (Petition at I).

Because this narrow factual question has been correctly resolved below three times, and because its reconsideration yet a fourth time will have no impact on any case other than this one, certiorari should be denied.

---

[3] The rule that issues not raised in the district court are waived on appeal is well established in the Seventh Circuit. Devalk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 338 (7th Cir. 1987); Shlay v. Montgomery, 802 F.2d 918, 921 (7th Cir. 1986); United States v. Kennedy, 797 F.2d 540, 544 (7th Cir. 1986), cert. denied, 107 S. Ct. 575 (1986); Erff v. Markhon Industries, 781 F.2d 613, 618 (7th Cir. 1986) ("[I]t is axiomatic that arguments not raised below are waived on appeal").

[4] In 1978, at the time of the court of appeals first Eighth Amendment immunity ruling, the qualified official immunity test was two-pronged: an objective "knew or should have known" standard and a subjective "malicious intent" standard (App. 50a). Immunity could be defeated under either prong (Id.). However, since "malicious intent" was not alleged, the court of appeals applied only the first, objective prong. Therefore, the Supreme Court's opinion in Harlow v. Fitzgerald, 457 U.S. 800 (1982), eliminating the subjective prong of the test id. at 815-18, did not affect the correctness of the 1978 result.

III. The Decision Below Is Consistent With This Court's Recent Decision In Anderson v. Creighton.

In Anderson v. Creighton, No. 85-1520 (June 25, 1987), this Court concluded that for a right to be clearly established under the Harlow standard, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent" (slip. op. at 4-5 (citations omitted)). Three times courts below have found that the petitioners knew or should have known that their conduct violated the respondent's Eighth Amendment rights. In light of the well-known Eighth Amendment standard outlawing grossly disproportionate punishment of prisoners, Weems v. United States, 217 U.S. 349 (1910), the record below leaves no doubt as to the apparent unlawfulness of petitioners' punitive segregation of Chapman for 289 days because of his sincere, religiously motivated refusal to handle pork.

The district court judge below found that "the adjustment committee was fully aware that Mr. Chapman's refusal to work was based on a sincerely held religious belief." (App. 77a). The district court also found that Mr. Chapman was allowed to remain in general population for two days following his refusal to work, during which time he worked, without incident, alongside the guard who cited him for the infraction (App. 77a, 77b). Then, despite the trivial nature of the disciplinary violation, and despite the fact that he was permitted to work in general population without incident for two days following the incident, he was punished with 289 days in punitive segregation, a punishment which the district court found, after hearing the evidence, involved significant deprivations (App. 79a, 79b). Moreover, the experts who testified concerning the issue of when the punishment became disproportionate, one of whom was an assistant warden at

Marion when Mr. Chapman was punished, agreed that 289 days for refusal to work was grossly excessive (App. 78a).

Finally, the court of appeals below, found particularization of the Eighth Amendment right in Bryant v. Harris, 465 F.2d 365, 367 (7th Cir. 1972), a case decided before Mr. Chapman was placed in segregation and which the court of appeals below found stood for the proposition that "excessive punishment in segregated confinement for the exercise of a religious right could subject prison officials to liability." (App. 10a-11a n.4). Thus, the courts below correctly applied the Harlow standard, both as it is set forth in Harlow and as it is interpreted in Anderson. All three courts to consider the issue applied the objective, not subjective, prong of the test. (See 123a-124a, 59a, 10a-11a n. 4).

This is thus clearly not a case in which prison officials made an inevitable, yet reasonable mistake. Compare Anderson, slip. op. at 5. While it is true that at that time no reported case had addressed the very action in question -- nine months of segregation for a religiously motivated refusal to touch pork -- such specificity is not required. Given the obvious outrageousness of petitioners' vindictive conduct, given the unanimity of the courts below which have considered the issue and given the opinions of the expert witnesses. Id. at 4-5, it is clear that under the preexisting standards of Weems and Bryant, the unlawfulness of petitioners conduct is "apparent." Anderson, at 5.

Because the courts below have decided the qualified immunity issue consistently with the dictates of Anderson, this Court should deny the writ.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Thomas F. Geraghty
Counsel of Record

Thomas F. Geraghty
Northwestern University Legal Clinic
357 East Chicago Avenue
Chicago, Illinois 60611
Telephone: (312) 908-8576

Of Counsel:

John S. Elson
Northwestern University Legal Clinic
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 908-8576

Stuart J. Chanen
Sachnoff Weaver & Rubenstein, Ltd.
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
(312) 207-1000

(3)

No. 87-28

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE W. PICKETT, ET AL., PETITIONERS

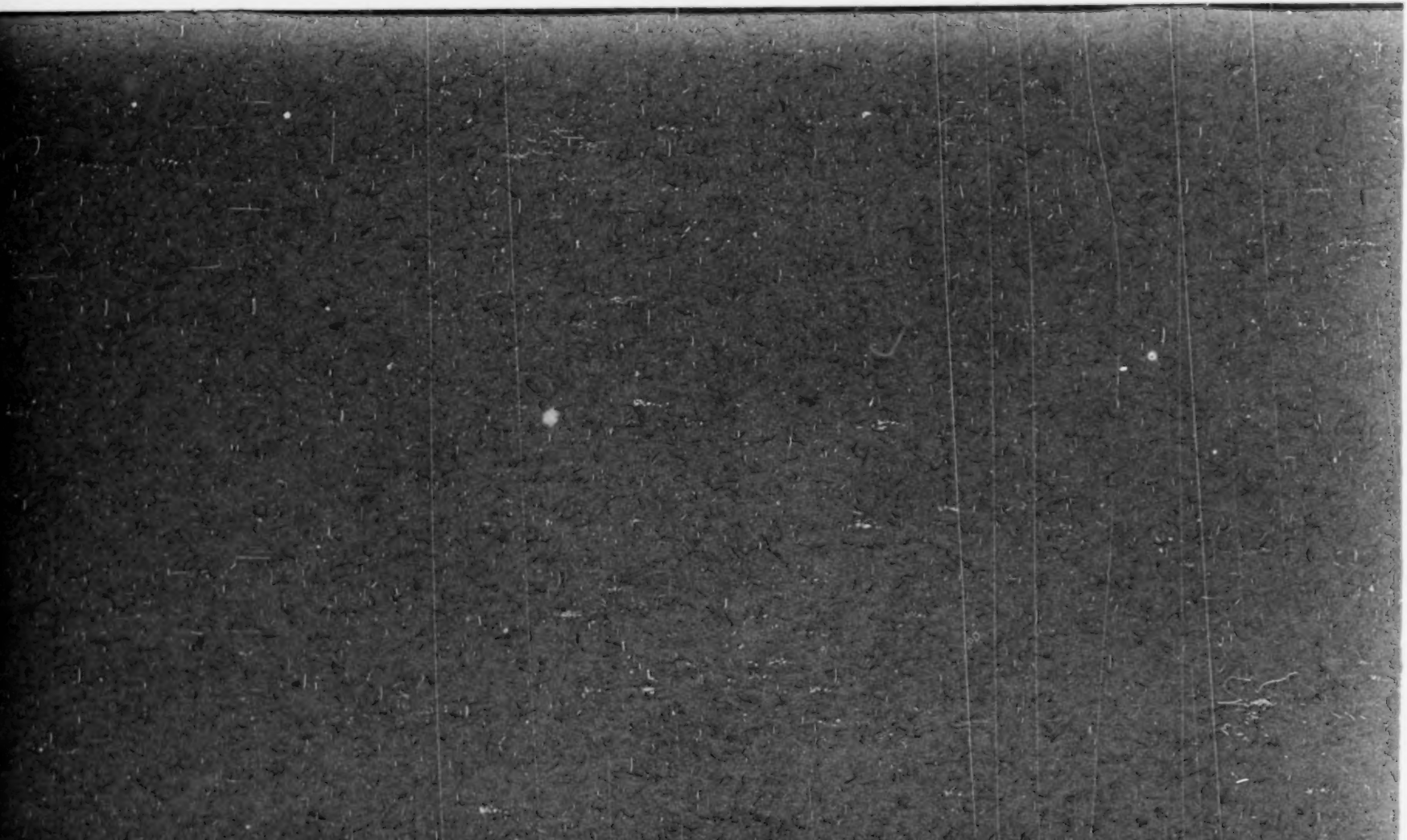
v.

EDWARD JOSEPH X. CHAPMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217



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Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 3

Constitution:

U.S. Const. Amend. VIII 1, 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-28

GEORGE W. PICKETT, ET AL., PETITIONERS

v.

EDWARD JOSEPH X. CHAPMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondent argues (Br. in Opp. 4-5) that petitioners did not properly raise their immunity claim in the courts below. In fact, however, this claim was raised and was given extensive consideration by both the district court and the court of appeals. It is therefore properly presented in this Court.

Petitioners raised the immunity issue when this case was tried before the district court. In its conclusions of law entered following the 1976 trial, the district court specifically rejected petitioners' immunity claim. The court stated that petitioners "knew or should have known that their confinement of [respondent] to segregation for a period of over nine months * * * was a violation of his clearly-established right to be free of cruel and unusual (disproportionate) punishment. Under those circumstances, such a confinement cannot reasonably be characterized as being in good faith" (Pet. App. 123a-124a). The court of appeals expressly upheld that determination (*id.* at 59a), remanding the case for calculation of damages on the Eighth Amendment claim (*id.* at

57a-58a). Petitioners again pressed the immunity issue before the court of appeals on the most recent appeal, contending that the issue should be reconsidered in light of this Court's intervening decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The court of appeals considered and rejected petitioners' claim (Pet. App. 10a-11a n.4). The immunity issue was thus raised in the courts below and decided by those courts. That is sufficient to preserve the issue for consideration by this Court.

Respondent first contends (Br. in Opp. 4) that petitioners' immunity claim was not properly preserved because petitioners did not frame their 1976 immunity argument in the precise manner in which the argument is presented in the certiorari petition. But, as respondent himself observes, "[p]etitioners' argument in this Court is that the court below misapplied the *Harlow* v. *Fitzgerald* standard. The argument that *Harlow* has been misapplied could only have been raised after the *Harlow* decision" (Br. in Opp. 5 n.2). Petitioners cannot be faulted because they failed to articulate an argument in 1976 in a manner that even respondent acknowledges could not have been presented until 1982.[1]

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[1] Respondent may be contending that petitioners should have raised their *Harlow* argument before the district court on the final remand in 1984. As a threshold matter, a claim once raised in and decided by both the district court and court of appeals need not be reasserted repeatedly in subsequent remand proceedings in those courts in order to preserve the claim for review in this Court. After all, the constraints of the law-of-the-case doctrine limit the authority of those courts to revisit claims previously resolved. These constraints, however, do not affect this Court's discretion to review the lower courts' initial determinations. See, *e.g.*, *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973).

Moreover, the particular circumstances of this case make clear that petitioners acted reasonably in waiting to urge the argument based on *Harlow* until the most recent proceeding before the court of appeals. Following the court of appeals' 1978 remand for the calculation of damages on the Eighth Amendment claim and for other purposes, the

Respondent also asserts (Br. in Opp. 5) that he was prejudiced because if he had been aware of the precise nature of petitioners' immunity claim in 1976, he would have adduced evidence at trial regarding prison officials' understanding of the limitations on their authority imposed by the Eighth Amendment. But it is not at all clear that such testimony would have been of assistance in assessing petitioners' entitlement to immunity: the *Harlow* test turns upon objective reasonableness, and courts typically examine the relevant precedents and decide for themselves whether a government official could reasonably believe that his conduct complied with the Constitution. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 530-535 (1985).[2] In any event, to the extent that such

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district court twice entered judgment for petitioners, once relying upon an intervening decision of this Court. The court of appeals each time vacated the district court's judgment and remanded for the calculation of damages on the Eighth Amendment claim. See Pet. 6-7 & nn.4-5. In its final remand order, issued in January 1982, the court of appeals stated that "[a]n appellate decision establishes the law of the case for all subsequent stages of the litigation. Thus, the trial court is restrained with respect to those issues that have been considered and resolved by the appellate court" (Pet. App. 38a). The court of appeals directed the district court to ascertain "when the [Eighth Amendment] violation began, and what the damage award should be" (*id.* at 39a). In light of the extremely limited scope of the remand, it is not surprising that when *Harlow* was decided only five months later, petitioners did not seek to relitigate the immunity issue before the district court. Indeed, although the court of appeals noted that petitioners had not reasserted the issue in the district court during the remand proceedings, it did not find that the issue had been waived, and it went on to address petitioners' immunity argument on the merits.

[2] Respondent observes (Br. in Opp. 4) that this Court held in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), that *Harlow* may in some circumstances require a fact-specific inquiry. But that inquiry is directed toward ascertaining the facts relating to the conduct challenged in the lawsuit. The Court did not indicate that the immunity inquiry turns upon expert testimony regarding the state of the law at the time of that conduct.

evidence might be relevant, respondent will be free to seek an evidentiary hearing on remand.

2. Respondent also asserts (Br. in Opp. 6-7) that certiorari should be denied because "resolution of the question presented by the petition turns only on the facts of this case and is of interest only to these parties." Respondent apparently believes that a rule of law announced by this Court should be applied to cases pending on certiorari only when the pending case itself is independently worthy of plenary review.

That contention is squarely inconsistent with this Court's settled practice of granting the certiorari petition in such a case, vacating the lower court's decision, and remanding the case for further proceedings. Respondent has not presented any substantive reason why the rule announced in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), should not be applied in this case.

Petitioners are government employees who face monetary liability, in their personal capacities, for their official acts in administering the Marion penitentiary. Simple fairness dictates that petitioners' immunity claim be evaluated under the proper standard before petitioners are required to assume personally any such monetary liability.[3]

For the foregoing reasons, and for the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of

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[3] Respondent argues (Br. in Opp. 7, 8-9) that the courts below have correctly resolved the immunity issue. If that is so, respondent has nothing to fear from a remand. As we discussed in the petition (at 10-11 & nn.6-7), however, the court of appeals did not cite any decision that would have made petitioners aware that the *duration* of an inmate's assignment to segregation was a matter governed by the Eighth Amendment. Judge Easterbrook correctly concluded in dissent that "[t]he answer to the question 'was it clearly established in 1973 that the eighth amendment forbids "excessive" administrative punishments' is No" (Pet. App. 27a).

the court of appeals vacated, and the case remanded for further consideration in light of this Court's decision in *Anderson* v. *Creighton, supra.*

CHARLES FRIED
Solicitor General

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